Employment Law

John Sanchez*
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I. HIRING

A. State of Florida as Employment Agency

Who would have guessed that the State of Florida would take out a help
wanted advertisement for exotic dancers? Exhibitionists willing to relocate to Stuart and dance at a nightclub were urged to send a résumé to the
Department of Labor/Bureau of Workforce Program Support, according to
an article in the Miami Herald.\footnote{John Pacenti, Strippers Wanted: State Runs Unusual Employment Ad, MIAMI HERALD, Apr. 16, 1999, at 5B.} Under federal law, before an employer is entitled to hire someone from another country, the employer must make a
finding that no Floridian is suitable for the job. If the efforts of the Florida Department of Labor are unavailing, the strip club’s application goes to the United States Department of Labor, which decides whether to approve certification for a work visa. If given the green light, only then, can the club request that the Immigration and Naturalization Service approve a foreign employee.

B. Negligent Hiring

A school in Davie, Florida is being sued for failing to run a criminal background check on a volunteer who turned out to be a convicted pedophile. According to reports the Miami Herald, the school was unaware of the volunteer’s criminal record. Similar charges had been raised against the same volunteer at a public school program for autistic children. The School Board noted that its own policy only requires those “who work one on one, unsupervised with children to be fingerprinted.” Florida law requires public school teachers to be fingerprinted in order to run background checks. If fingerprint tracing reveals that a teacher has been convicted of a crime involving moral turpitude, the teacher must be removed from any position involving direct contact with students.

While many employment checks now include a routine review of criminal records compiled by the National Crime Information Center, an employer’s failure to check up on applicants does not invariably reflect gross negligence. As a practical matter, employers are advised to conduct background investigations as a strategy for averting liability stemming from negligent hiring. Liability under Title 42 of the United States Code § 1983, The Civil Rights Act, may lie only upon the exercise of some governmental policy. Liability does not rest wholly on a showing of a master-servant relationship, also known as respondeat superior.


2. Id.
3. Id.
4. Id.
5. Shari Rudavsky, Families Sue Man Accused of Sex Abuse Suits: Davie School, Nova Negligent, MIAMI HERALD (Broward), May 7, 1999, at 1A.
6. Id.
7. Id.
8. Id.
10. Id.
II. HOURS AND WAGES

A. Fair Labor Standards Act

1. Constitutionality of FLSA Extension to Public Sector

Under the Eleventh Amendment of the United States Constitution, federal courts lack jurisdiction over suits by individuals against states for violating federal law.15 However, in 1996, in Seminole Tribe v. Florida,16 the Supreme Court ruled that the Eleventh Amendment bars Congress from subjecting states to suits in federal court for violating acts of Congress passed pursuant to its powers under the Commerce Clause of the Constitution.17 The Fair Labor Standards Act ("FLSA"),18 enacted under the Commerce Clause, authorizes federal court suits by state employees.19 Since Seminole Tribe, the Eleventh Circuit, among other courts, has ruled that it lacks jurisdiction over state employees' FLSA claims against a state.20

In 1999 the Supreme Court ruled that states have sovereign immunity in state courts similar to their Eleventh Amendment immunity in federal courts.21 In 1992, ninety-six state probation and parole officers sued the State of Maine in federal court for violating the FLSA by not giving them premium pay for overtime.22 In light of Seminole Tribe, the workers' suit was dismissed, and the First Circuit Court of Appeals affirmed the dismissal.23 The public employees then turned to the Maine courts for relief.24 The Supreme Judicial Court of Maine affirmed the judgment of the Superior Court of Cumberland County, deciding that the State enjoyed sovereign immunity in its own courts, and likewise dismissed the suit.25 The

15. U.S. CONST. amend. XI. The Eleventh Amendment recites: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Id.
17. Id. at 44.
19. Id. § 202.
23. Id. at 40–41.
25. Id. at 175–76.
Supreme Court of the United States agreed with the lower courts and affirmed. 26

Justice Kennedy's opinion for the majority in Alden v. Maine 27 stated that the Eleventh Amendment did not govern the case. 28 At the same time, he made clear the principle that state immunity "is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." 29 In his dissent, Justice Souter warned that 4.7 million state employees were now barred from suing their employer in both state and federal court. 30 Although the federal government can still sue in state court, the labor department is ill equipped to take up the slack left by Seminole Tribe and Alden.

2. Minimum Wage Issues

Thousands of Haitian migrants earned less than $100 for up to sixty-hour workweeks, picking beans in the vegetable fields of South Dade County. 31 According to an article in the Miami Herald, many of these farmworkers hope to convince a federal court judge in Miami that they are owed three million dollars in back minimum wages. 32 Six hundred twelve workers filed a class action suit in 1990, but their case is only now being heard. 33 The farmers contend that they did provide minimum-wage payments to contractors, who then paid the workers less than minimum wage. 34 In depositions, the contractors conceded that they never kept any records. 35 In 1996 the Eleventh Circuit ruled that the growers, not the labor contractors, were the actual employers of the migrant workers. 36 As a result, the farmers bear the burden of obeying federal wage and hour laws. 37 The case could take a year to reach a decision. 38

27. Id. at 2240.
28. Id. at 2254.
29. Id. at 2243.
31. David Lyons, Migrant Workers Take Wage Dispute to Court, MIAMI HERALD, Feb. 14, 1999, at 1B.
32. Id.
33. Id.
34. Id.
35. Id.
36. Lyons, supra note 31, at 1B.
37. Id.
38. Id.
The Miami-Dade County Commission voted twelve to zero on May 11, 1999 to enact a “living wage” ordinance, requiring Miami-Dade County, and companies that furnish services to the County, to pay employees at least $8.56 per hour with health benefits, according to a report in the Miami Herald. The ordinance will raise the salaries of 1760 full-time and part-time public employees working for the county. The law, to be phased in over several years, becomes fully effective in October, 2002. Miami-Dade joins twenty-six other cities across the nation that have adopted similar laws.

President Clinton has proposed raising the minimum wage by one dollar, to $6.15, by September, 2000. Federal Reserve Chairman, Alan Greenspan, opposes the increase. The pros and cons of such an increase were debated recently in the Miami Herald.

3. Independent Contractors v. Employees

FLSA, the Act governing minimum wage and overtime pay, was amended by Congress in 1974 to cover the vast majority of state and local government employees. In Brouwer v. Metropolitan Dade County, a juror alleged that failure to compensate jurors for jury duty amounted to a FLSA violation. The Eleventh Circuit dismissed the suit, ruling that there is no employment relationship between a juror and the county. The circuit court applied the “economic reality” test to determine whether an employment relationship existed. Moreover, the court made clear that the issue of employment status under the FLSA is a question of law.

39. Don Finefrock, Living Wage is Approved for Dade, MIAMI HERALD, May 12, 1999, at 1B.
40. Id.
41. Id.
42. Id.
44. Id.
45. Id.
47. 139 F.3d 817 (11th Cir. 1998).
48. Id. at 818.
49. Id. at 819.
50. Id. (citing Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 31–33 (1961); Aimable v. Long & Scott Farms, 20 F.3d 434, 439 (11th Cir. 1994)).
51. Brouwer, 139 F.3d at 818 (citing Villarreal v. Woodham, 113 F.3d 202, 205 (11th Cir.1997)).
Sanchez

Dade County clearly falls within the FLSA's definition of public employer. The court cited an array of differences between public employees and jurors, including the following: 1) jurors are selected involuntarily from voter registration lists; 2) jurors enjoy no sick or annual leave, nor job security, nor social security or pension benefits; 3) jurors do not voluntarily give their labor to the state, but are forced to serve; 4) jurors are not paid a salary, instead, they are entitled to a statutorily set sum no matter how many hours they serve; and 5) the state lacks the power to fire jurors for poor performance, but must accept their verdict.

4. FLSA Exemption Section 13(a)(1) Exemption for Executive, Administrative, and Professional Workers

Section 13(a)(1) of the FLSA carves out a minimum wage and overtime pay exemption for any employee working "IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY." The basic test for measuring whether an employee is salaried is found at 29 C.F.R. § 541.118(a). Under this Department of Labor regulation,

[a]n employee will be considered to be paid "on a salary basis" . . . if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

There was a split among the circuit courts over whether docking must have actually occurred, or whether mere potential was enough. The Supreme Court settled the issue in Auer v. Robbins in 1997. Auer upheld the Secretary of Labor's regulation in 29 C.F.R. § 541.118, making clear that public employees, to win exemption from overtime pay, must not face salary reductions because of variations in quantity or quality of work performed. However, Auer left several loose ends, but the Supreme Court recently

53. Brouwer, 139 F.3d at 819.
55. 29 C.F.R. § 541.118(a).
56. Id.
58. Id.
59. Id. at 452.
60. Id. at 463–64.
denied certiorari in *Davis v. City of Hollywood*, 61 an Eleventh Circuit case arising in Florida. 62 *Davis* raised the question whether the "window of correction" spelled out in regulations covering deductions made inadvertently would be lost, even if the employer reimbursed the employee for such deductions and promised to comply in the future. 63

5. Prohibited Employer Acts Under the FLSA

FLSA makes it unlawful for any person to deal in any manner with goods which were produced by employees whose pay did not conform with the minimum wage and overtime provisions of the Act, 64 or to violate the minimum wage and overtime rules themselves. 65 *Tyler v. State* 66 raised the question whether this provision of the FLSA is violated when an employee is denied the right to prove his case of fraudulent denial of overtime in court. 67

B. Equal Pay Act

The Equal Pay Act of 1963 ("EPA") 68 aimed at ensuring that employees doing equal work should be paid equal wages, regardless of sex. 69 In 1999, Congress took up a bill, the Paycheck Fairness Act, 70 designed to strengthen the FLSA by allowing for compensatory and punitive damages and putting gender based wage bias on an equal footing with race or ethnicity based wage discrimination. 71 The proposed bill would also prohibit employers from punishing workers for sharing salary information with their coworkers. 72 Moreover, Congress is considering reintroducing the Fair Pay Act 73 aimed at barring pay bias on grounds of sex, race, or national origin for work in "equivalent" jobs. 74

62. *Id.* at 1178.
63. *Id.* at 1180.
65. *Id.* § 215(a)(2).
67. *Id.* at 812.
69. *Id.*
71. *Id.*
72. *Id.*
74. *Id.*
III. INVASION OF PRIVACY

A. Public Employee Drug Testing

In Cox v. McCraley,75 Cox worked for the Osceola County School Board as a lead painter.76 After working there for eleven years, Cox received a letter from his supervisor, Whitman, stating "that he had a 'reasonable suspicion' that Cox had violated School Board policy regarding drug and/or alcohol abuse."77 Three options were offered to Cox: 1) undergo drug testing; 2) join an employee assistance program; or 3) hand in his resignation.78 When Cox elected to take the drug screening test, he was told that this option had been mistakenly included, and that it was no longer available.79 Although Cox completed his annual contract, he was not reappointed.80

Cox filed a grievance, and after conducting a full evidentiary hearing, the School Board ruled "that there was no reasonable suspicion of drug use by Cox ..."81 At the same time, the Board made clear that it was powerless to change the decision not to reappoint Cox.82 Cox appealed the Board’s ruling to Florida’s Fifth District Court of Appeal, which sustained the Board’s decision.83

In his lawsuit in federal district court, Cox claimed that the defendants committed an "unwarranted invasion of [his] fundamental right to privacy ...."84 Cox sued under § 1983 of title 42 of the United States Code, claiming violations of the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution.85 Cox also invoked the corresponding sections of the Florida Constitution, and a claim for intentional infliction of emotional distress under Florida common law.86

In its opinion, the federal district court agreed that Cox was entitled to rely on § 1983 to raise violations of his Fourth Amendment right to privacy

75. 993 F. Supp. 1452 (M.D. Fla. 1998).
76. Id. at 1454.
77. Id.
78. Id.
79. Id.
80. Cox, 993 F. Supp. at 1454.
81. Id. at 1454–55.
82. Id. at 1455.
84. Cox, 993 F. Supp. at 1455 (alteration in original) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
85. Id.
86. Id.
and his Fifth Amendment right to procedural due process. However, before a city is liable under § 1983, the plaintiff must allege municipal liability based upon an officially promulgated policy or an unofficially adopted custom. Cox’s claim of a municipal policy, the letter Whitman wrote to Cox raising a suspicion of drug or alcohol abuse, establishes, at most, a claim that such is an unofficially adopted custom of the School Board. Custom will support municipal liability only if it is so entrenched and long standing that it carries the force of law. The federal district court concluded that Cox failed to state a claim against the School Board under § 1983. Assuming arguendo, that Cox had stated a § 1983 claim, his privacy claim under the Fourth Amendment was unavailing. Cox fell short of alleging that anything “implicit in the concept of ordered liberty” was at stake. Cox’s due process claims under the Fifth and Fourteenth Amendments suffer the same fate; absent a property interest in reappointment, no procedural due process violation took place. Even so, the Board offered Cox a full evidentiary hearing.

Turning to Cox’s federal claims against his former supervisors in their individual capacity, the court made clear that Cox failed to prove that the defendants acted under color of state law to deprive Cox of a right conferred by the Constitution or the laws of the United States. The court concluded that “government officials performing discretionary functions are entitled to qualified immunity from civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” The court ruled that Cox’s supervisors “were acting within the scope of their authority and did not violate any clearly established law of which a reasonable person would have known.” Cox’s complaint was dismissed with prejudice. In addition, the court declined supplemental jurisdiction over Cox’s state law claims.

87. Id.
88. Id. (citing Monell v. Department of Soc. Servs., 436 U.S. 658, 690–91 (1978)).
89. Cox, 993 F. Supp. at 1456.
90. Id. (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988)).
91. Cox, 993 F. Supp. at 1456.
92. Id.
93. Id.
94. Id.
95. Id.
96. Cox, 993 F. Supp. at 1457.
97. Id. (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
98. Id.
99. Id. at 1457–58.
100. Id. at 1458.
B. False Light Invasion of Privacy

Apart from constitutional protection of privacy found either in the Fourth Amendment or in the penumbras the Bill of Rights, privacy founded on state constitutions, statutes, and common law has been invoked by public employees as a separate cause of action sounding in tort. 101 To state a claim of tortious invasion of privacy, the intrusion must be unreasonable or offensive and must outweigh the employer’s need to pry. 102 Claims of invasion of privacy committed by public employers are often defeated either by statutory or common law public official immunity. 103

In Harris v. District Board of Trustees, 104 coordinators of a criminal justice program run by a community college sued for invasion of privacy after they lost their jobs. 105 The court sustained the former public employees’ claim that the community college had presented the workers in a false light. 106 Similarly, the Miami Herald recently reported on a case involving public employment and invasion of privacy. 107 Andrew Greene ran against School Board member Miriam Oliphant in 1992, but Greene’s prospects dimmed amid news reports that he had received counseling for psychological problems. 108 In 1997 a jury awarded Greene $600,000 for invasion of privacy and $250,000 for negligence. 109 The Fourth District Court of Appeal handed down an opinion in June, 1999 affirming the jury’s award of $850,000 to the former School Board candidate. 110 The jury agreed with the former teacher that his employer had no right to release Greene’s confidential psychological records to the news media without his consent. 111 At the same time, state law limits claims against public entities to $100,000

102. See id. at 1329.
103. See id.
104. 9 F. Supp. 2d 1319 (M.D. Fla. 1998).
105. Id. at 1322.
106. Id. at 1329.
107. Daniel de Vise, Judgment Against Schools Upheld Candidate’s Files Leaked to Media, MIAMI HERALD (Broward), June 19, 1999, at 3B.
108. Id.
109. Id.
110. Id. (citing School Bd. of Broward County v. Greene, 24 Fla. L. Weekly D1392 (4th Dist. Ct. App. June 16, 1999) (the opinion cited in the article was later withdrawn and superseded on denial of reh’g by School Bd. of Broward County v. Greene, 739 So. 2d 668 (4th Dist. Ct. App. 1999)).
111. Id.
for negligence.\textsuperscript{112} It is up to the state legislature to approve any higher sum, which seems unlikely.\textsuperscript{113}

IV. RIGHT AGAINST SELF-INCrimINATION

Under the Fifth Amendment of the United States Constitution, no person "shall be compelled in any criminal case to be a witness against himself."\textsuperscript{114} This ban on compelled testimony covers evidence that might be admissible against a public employee in a criminal proceeding.\textsuperscript{115} A public employee who confesses to self-incriminating evidence of criminal behavior when threatened with dismissal from employment may invoke the privilege in defense.\textsuperscript{116} The privilege may not be invoked, however, when the compelled testimony will not be relied upon in a criminal proceeding.\textsuperscript{117}

In \textit{United States v. Veal},\textsuperscript{118} Veal, Camacho and other police officers, were members of the Street Narcotics Unit ("SNU") of the Miami Police Department.\textsuperscript{119} The Chief of Police received a letter in which an anonymous informant warned that unidentified drug dealers had met at Seventh Avenue and N.W. Thirty-Second Street, in Miami and had contracted to kill Camacho.\textsuperscript{120} The police knew this address was the home of Mercado, a drug dealer.\textsuperscript{121} On their way to a sting operation, Veal and other SNU members stopped at Mercado's house, approached Mercado, who was outside, and led him into his house.\textsuperscript{122} Soon, police cars and a fire rescue unit arrived in response to calls for assistance from Camacho.\textsuperscript{123} Despite emergency medical efforts, Mercado died at the scene.\textsuperscript{124} Pictures taken of Camacho once he returned to the police station showed a long rip in the front of Camacho's shirt.\textsuperscript{125} These pictures, plus a butcher knife (allegedly retrieved from the crime scene) and a bag of crack cocaine (allegedly seized from Mercado) were placed in the lieutenant's cabinet.\textsuperscript{126}

\textsuperscript{112}. De Vise, \textit{supra} note 107, at 3B (referring to \textit{FLA. STAT.} § 768.28 (1999)).
\textsuperscript{113}. \textit{Id.}
\textsuperscript{114}. \textit{U.S. CONST.} amend. V.
\textsuperscript{115}. \textit{See id.}
\textsuperscript{119}. \textit{Id.} at 1236.
\textsuperscript{120}. \textit{Id.}
\textsuperscript{121}. \textit{Id.}
\textsuperscript{122}. \textit{Id.}
\textsuperscript{123}. Veal, 153 F.3d at 1236.
\textsuperscript{124}. \textit{Id.}
\textsuperscript{125}. \textit{Id.}
\textsuperscript{126}. \textit{Id.}
A Federal Bureau of Investigation ("FBI") investigation led to federal civil rights charges against Camacho, Veal and other police officers for violating Mercado's civil rights.\textsuperscript{127} The district judge found the statements concerning the circumstances of Mercado's death within the scope of \textit{Garrity v. New Jersey},\textsuperscript{128} and granted the officers' motion to suppress the statements.\textsuperscript{129} The officers were acquitted of conspiracy in the civil rights trial, and the jury deadlocked on the other charges.\textsuperscript{130} In July of 1993 a federal grand jury in South Florida indicted Camacho, Veal, and two other police officers for conspiring to obstruct justice, for perjury, and for giving false statements.\textsuperscript{131} The defendants once again moved to suppress their statements, which had been suppressed under \textit{Garrity} in the civil rights trial.\textsuperscript{132} The judge denied those motions, and both Camacho and Veal were convicted and received prison sentences.\textsuperscript{133}

On appeal, Veal challenged the district court's refusal to suppress their statements after Mercado's death, since the same judge had suppressed those statements under \textit{Garrity} in the civil rights trial.\textsuperscript{134} In \textit{Garrity}, the Supreme Court made clear that the Fifth Amendment applies to police officers facing interrogation by other law enforcement officers and that "incriminating statements made under threat of termination for remaining silent are inadmissible in a subsequent criminal prosecution concerning the matter of inquiry absent a knowing and voluntary waiver."\textsuperscript{135}

The Eleventh Circuit ultimately ruled that \textit{Garrity} and the Fifth Amendment do not protect false statements from subsequent prosecutions:

When an accused has been accorded immunity to preserve his right against self-incrimination, he must choose either to relinquish his Fifth Amendment right and testify truthfully, knowing that his statements cannot be used against him in a subsequent criminal prosecution regarding the matter being investigated, or continue to assert the privilege and suffer the consequences. There is no third option for testifying falsely without incurring potential prosecution for perjury or false statements.\textsuperscript{136}

\begin{itemize}
  \item \textsuperscript{127} Id. at 1238.
  \item \textsuperscript{128} 385 U.S. 493 (1967).
  \item \textsuperscript{129} Veal, 153 F.3d at 1238.
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Veal, 153 F.3d at 1238–39.
  \item \textsuperscript{135} Id. at 1239 (citing Garrity v. New Jersey, 385 U.S. 493 (1967)).
  \item \textsuperscript{136} Id. at 1241.
\end{itemize}
V. FRAUD CASES TIED TO DOWNSIZING

In July of 1999 a supervisory claims examiner for the Department of Veterans Affairs ("VA") in Florida, who stole $615,451 by writing up a false claim in her fiancé's name, was sentenced to thirty-three months in prison, according to a news report in the *Washington Post*. Investigators say Joy Cheri Brown, a supervisory claims examiner for the VA, falsely granted a 100% disability claim to her fiancé, a St. Petersburg police officer, who had served in the military during Desert Storm. By the time the scheme was detected, Brown had granted her fiancé payments totaling $519,981, and awarded him a $5011 monthly payment for a fake injury. The inspector general for the VA attributed the fraud to staff reductions that left the VA more vulnerable; the VA's benefits staff has been cut by twenty percent since 1993. The VA's inspector general referred to the case as "the dangers inherent in downsizing."

VI. REGULATION OF OFF-DUTY BEHAVIOR

At times, the public employer may fairly stake a claim in the off-duty behavior of its employees to achieve a smoothly running agency or to preserve its image of integrity and honesty. Arguably, the employer's stake is greatest when crimes are committed while the public employee is off-duty. For example, in *Castilleja v. City of Jacksonville*, while off-duty and in his own car, Castilleja, a Jacksonville police officer, hit and damaged a fence and sign at a trailer park, and left the scene without reporting the incident to the authorities. Additionally, he did not leave the statutorily mandated information with the trailer park management or owners. The next day, an eyewitness reported Castilleja's tag number to the police. Although he initially lied, Castilleja eventually came clean and

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138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
143. *See id.*
144. 738 So. 2d 335 (Fla. 1st Dist. Ct. App. 1998).
145. *Id.* at 335.
146. *Id.*
147. *Id.*
admitted his role in the accident. For this, Castilleja received two noncriminal traffic citations: one for leaving the scene without leaving information, and one for careless driving.

As a result of this incident, Castilleja received “notice of immediate suspension with termination to follow.” After a plenary evidentiary hearing, the Jacksonville Civil Service Board ruled that the punishment was at odds with the City’s charter and that it was manifestly unjust. On appeal, the circuit court reversed the Board’s ruling as unsupported by competent substantial evidence. On appeal, Castilleja claimed that the lower court had improperly reweighed the evidence and substituted its judgment for the Board’s. The court of appeal agreed. The lower court’s scope of review was confined to: 1) whether the Board afforded due process; 2) whether the basic tenets of the law were observed; and 3) whether the Board’s findings of fact and conclusions of law were grounded in competent substantial evidence. The First District Court of Appeal concluded that the circuit court failed to determine whether the Board’s rulings were supported by competent substantial evidence, and instead reviewed the record to see if the Sheriff’s decision was supported by competent substantial evidence. The circuit court erroneously sat as a new Board and reweighed the evidence in the case. As for Castilleja’s request for backpay, the court of appeal ruled that his request for postponement should not result in his employer having to pay for time he did not work.

An article in the Miami Herald reported on a moonlighting case involving a Hollywood police officer that was caught working an off-duty security job during his regular patrol shift. As punishment, the officer was suspended for six months from performing twenty dollars an hour moonlighting assignments and his eligibility for promotion or transfer was withdrawn for one year. The officer was cleared of criminal wrongdoing,

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148. Id. at 335–36.
149. Castilleja, 738 So. 2d at 336.
150. Id.
151. Id.
152. Id.
153. Id.
154. Castilleja, 738 So. 2d at 336.
155. Id. (citing Haines City Community Dev. v. Heggs, 658 So. 2d 523 (Fla. 1995)).
156. Id.
157. Id. at 337.
158. Id.
160. Id.
However, \textsuperscript{161} The Hollywood Police Department conducted a probe into off-duty jobs after the \textit{Miami Herald} ran its own investigation into the practice. \textsuperscript{162} The newspaper's probe yielded many examples in which officers were scheduled to be in two places at once. \textsuperscript{163} Hollywood's off-duty policy was run as a "buddy-buddy" or "clique" system often at the cost of offending minorities and female officers. \textsuperscript{164} The report recommended that the Department assign off-duty work through a rotation system. \textsuperscript{165} Before any changes can occur, however, the City must bargain with the police union over the issue, and the union is known to be hostile to a rotation system. \textsuperscript{166}

\section*{VII. FAMILY AND MEDICAL LEAVE ACT}

Under the Family and Medical Leave Act ("FMLA"), \textsuperscript{167} all eligible state and local government employees are entitled to twelve weeks of unpaid leave in a twelve month period: 1) for birth or adoption of a child or placement of a foster child; 2) to care for a spouse, child or parent with a serious health condition; or 3) for the employee's own serious health condition. \textsuperscript{168} Leaves taken in response to a "serious health condition" include time laid up in a hospital, hospice or residential medical care facility. \textsuperscript{169}

In \textit{Wright v. Department of Children & Families}, \textsuperscript{170} Wright, a former employee of the Department of Children and Families, was unexpectedly absent from work. \textsuperscript{171} His illnesses included an abscessed tooth, gastritis, hepatitis A, bronchitis, and acute arthritis. \textsuperscript{172} Wright notified his supervisor of his illnesses and furnished medical certification for these absences. \textsuperscript{173} Wright was disciplined for his use of approved leave. \textsuperscript{174} Wright argued that

\begin{thebibliography}{99}
\bibitem{161} Corey Dade, \textit{Officer's Off-Duty Job While On Duty No Crime: Policeman May Still Face Action}, \textit{MIAMI HERALD} (Broward), Jan. 28, 1999, at 1A.
\bibitem{162} \textit{Id.}
\bibitem{163} Corey Dade, \textit{Fix Off-Duty Work Policy, Cops Advised}, \textit{MIAMI HERALD} (Broward), Dec. 11, 1998, at 1B.
\bibitem{164} \textit{Id.}
\bibitem{165} \textit{Id.}
\bibitem{166} \textit{Id.}
\bibitem{168} \textit{Id.} § 2612.
\bibitem{170} 712 So. 2d 830 (Fla. 3d Dist. Ct. App. 1998).
\bibitem{171} \textit{Id.} at 831.
\bibitem{172} \textit{Id.}
\bibitem{173} \textit{Id.}
\bibitem{174} \textit{Id.}
\end{thebibliography}
the Department’s imposition of discipline for the use of approved sick leave violated the FMLA.175

Wright worked in a health care facility with a skeleton staff.176 Among his daily duties, Wright had to bathe, change, dress, and feed special needs patients.177 Wright’s absences forced the agency to assign scarce staff to fill the gap.178 For this reason, Wright’s absences undermined the Department’s ability to furnish adequate health care services to patients.179 The Third District Court of Appeal concluded that the Department had cause to discipline Wright for excessive absenteeism.180

Under the FMLA, an employee who seeks leave for medical reasons must establish that he suffers from a “serious health condition.”181 The FMLA defines this term to cover an illness that involves inpatient care at a medical facility or “continuing treatment by a health care provider.”182 The Third District Court of Appeal concluded that Wright did not establish that he sustained a qualifying “serious health condition” as required by the FMLA.183 The court ruled that the hearing officer’s findings of fact were grounded upon competent, substantial evidence.184

The question has been raised whether FMLA suits against state employers may be brought in federal courts.185 In Driesse v. Florida Board of Regents,186 the United States District Court for the Middle District of Florida ruled that FMLA suits against state employers in federal court are barred by the Eleventh Amendment of the United States Constitution.187

VIII. WORKERS’ COMPENSATION

A. Tort Actions and Exclusivity

Employers originally agreed to no-fault liability under workers’ compensation statutes in exchange for immunity from tort liability for injuries or

175. Wright, 712 So. 2d at 831.
176. Id. at 832.
177. Id.
178. Id.
179. Id.
180. Wright, 712 So. 2d at 832.
182. Id. § 2611(11)(a), (b).
183. Wright, 712 So. 2d at 832.
184. Id.
187. Id. at 1331.
diseases that employees suffer in the course of their employment. Like every other jurisdiction, Florida's workers' compensation statute preempts state tort claims covered by workers' compensation.

In Dade County School Board v. Laing, Ronald Laing was involved in an incident while he was working as a teacher at Hialeah High School. As he was leaving a classroom, a golf cart driven by the school custodian, Joe Rodriguez, hit him. At Hialeah High, custodians and security guards drive golf carts to cross the school grounds. After his injury, Laing applied for, and was granted, workers' compensation benefits. All the same, Laing also brought a personal injury lawsuit against the School Board. The question for the Fourth District Court of Appeal was whether the exclusivity provision of the workers' compensation statute precluded Laing's state tort claim.

Whether Laing could sue the School Board in tort turned on whether he was involved in "unrelated works" when the accident occurred. If he was, then workers' compensation did not preclude his state tort claim against the School Board. Section 440.11(1) of the Florida Statutes carves out an exception to workers' compensation immunity when employees are "operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment." Laing claimed that, because his job as a teacher and Rodriguez's role as a custodian were "unrelated," the exception is triggered, thus piercing the School Board's immunity.

Whether an employee is involved in "unrelated works" turns on the following factor as framed by the court: "[W]hether the co-employees are involved in different projects," and "[t]hus, the focus is upon the nature of the project involved, as opposed to the specific work skills of individual employees."

190. 731 So. 2d 19 (Fla. 3d Dist. Ct. App. 1999).
191. Id. at 20.
192. Id.
193. Id.
194. Id.
195. Laing, 731 So. 2d at 20.
196. Id.
197. Id.
198. Id.
200. Laing, 731 So. 2d at 20.
201. Id. (citing Vause v. Bay Med. Ctr., 687 So. 2d 258 (Fla. 1st Dist. Ct. App. 1996); Abraham v. Dzafic, 666 So. 2d 232 (Fla. 2d Dist. Ct. App. 1995)).
The trial court found that the teacher and custodian were engaged in "unrelated works" when the accident occurred and thus, Laing's tort claim against the School Board could proceed.202 The Third District Court of Appeal reversed the trial court.203 The court reasoned that just because employees perform different duties it does not invariably mean that they are involved in "unrelated works."204 The court concluded that the teacher and custodian were co-employees undertaking education related services for students at school when the accident occurred.205 Both were part of a team in promoting education at the school.206 As a result, the teacher and custodian were not engaged in "unrelated works" and, therefore, the teacher's state tort claim was precluded by the exclusivity provision of the workers' compensation statute.207

B. Injuries Arising from Employee Misconduct

An alternate route around the exclusivity provision of workers' compensation is to show that injuries sustained stemmed from the intentional misconduct of a co-employee.208 For example, in *Castellano v. Raynor,*209 Gina Castellano worked as a secretary at Graham Elementary School.210 On January 27, 1995, Mark Raynor, a physical education teacher also employed at the school, tossed a football at Castellano, causing injuries.211 As employees of the Hillsborough County School Board, both employees were immune from suit unless they acted "in bad faith or with malicious purpose, or in a manner exhibiting a willful and wanton disregard of human rights, safety, or property."212

Here, Castellano and Raynor were friends and coworkers.213 On the day in question, Raynor was waiting for his next class to assemble on the football field and absent-mindedly tossed a football to some students who passed by.214 Raynor saw Castellano leaving a building, called her name,
and threw the ball "underhanded in a slow arc toward her for her to catch." Inadvertently, the ball hit Castellano in the jaw and upper chest. Raynor immediately apologized, especially when he afterwards noticed that Castellano was carrying student files. Although Raynor knew Castellano had jaw problems, no evidence shows that Raynor intentionally tossed the ball at her head. Apparently, Castellano detected no ill will, given that she applied for and was awarded workers' compensation benefits.

The trial court ruled that Raynor was immune from suit and the Second District Court of Appeal affirmed. In support of this conclusion, the district court cited the holding in *Castro v. Allstate Insurance Co.*, wherein a police officer playfully tickled another officer's ear with the antenna of his hand-held radio, and the second officer abruptly and unexpectedly turned his head, forcing the antenna into his ear canal and rupturing his ear drum. The Third District Court of Appeal found no evidence of intent to injure the second officer and reversed the lower court's grant of summary judgment in favor of the first officer's homeowner's insurance company, which had tried to characterize the injury as intentional. Similarly, in this case, Raynor's culpability, at most, rises to the level of negligence, far below the level of culpability needed to make him liable.

C. Relation of Injury to Employment

Workers' compensation benefits are awarded only for injuries or diseases arising out of work performed in the course and the scope of employment. While workers' compensation statutes are liberally construed in favor of compensating the injured, some accidents that take place while the public employee is off-duty are too remote for coverage under the law. For example, in *City of North Bay Village v. Millerick*, an off-duty

215. Id.
216. Id. at 1199.
217. Id.
218. Id.
219. *Castellano*, 725 So. 2d at 1199.
220. Id.
221. 724 So. 2d 133 (Fla. 3d Dist. Ct. App. 1998).
222. Id. at 134.
223. Id. at 135.
224. *Castellano*, 725 So. 2d at 1199.
police sergeant, Millerick, was drinking at the Polo Club, a bar in North Miami Beach, at 5:00 a.m. when he struck up a conversation with Billy Martino, a man suspected to be involved in selling illegal drugs. They ended up fighting, but Millerick left after Martino shouted to other bar patrons that Millerick was a police officer. Later, in the parking lot, two men accosted Millerick, but Millerick was able to escape in his car. While driving toward North Bay Village, Millerick sensed the two men in their car were following him. As he sped away, Millerick lost control of his car, crossed over the median into oncoming traffic and collided with a car traveling in the opposite direction. The driver of the other car died, and Millerick was grievously injured.

While Millerick admitted that he had been drinking throughout the evening of the accident, he denied that he was drunk. Millerick applied for workers’ compensation benefits, but the case went unresolved for six years after the initial hearing on the issue of coverage. Finally, on February 17, 1998, the Judge of Compensation Claims awarded Millerick disability benefits. In support of this award, the judge ruled that Millerick had been engaged in his primary duty as a police officer when he was injured. Florida has a special rule governing police officers’ actions when it comes to scope of employment. “[A] police officer who was discharging a primary law enforcement responsibility ‘shall be deemed to have been acting in the course of employment’ regardless of the officer’s duty status at the time.” However, evidence that a police officer was prepared to discharge a law enforcement duty falls short of justifying an injury as arising in the course of the officer’s employment. Here, the alleged law enforcement nexus comes from the encounter between Millerick and Martino. The First District Court of Appeal found that this encounter did not arise from a desire to execute a legitimate law enforcement function;

228. Id. at 1230.
229. Id.
230. Id. at 1231.
231. Id.
232. Millerick, 721 So. 2d at 1231.
233. Id.
234. Id.
235. Id.
236. Id.
237. Millerick, 721 So. 2d at 1231.
238. Id. (quoting FLA. STAT. § 440.091 (1997)).
239. Id.
240. Id.
241. Id. at 1232.
Millerick’s injuries were sustained during a night of social drinking. This aim was not altered because Millerick started arguing with a man who turned out to be a potential suspect. In sum, the bar fight did not take place “under circumstances reasonably consistent” with the manner in which an officer’s primary responsibility would be performed. Even more remote was the nexus between the bar incident and the causeway accident. These two incidents may be wholly unrelated. The First District Court of Appeal concluded that Millerick was not entitled to recover workers’ compensation benefits.

D. Attorneys’ Fees

In Volusia County Fire Services v. Eaby, Alan Eaby was working as a paramedic when he was exposed to the hepatitis C virus during the scope and course of employment. The public employer conceded the condition was a compensable, occupationally contracted disease. The employer later admitted that Eaby was temporarily and totally disabled. Eaby sought attorney’s fees provided under workers’ compensation law. The Judge of Compensation Claims granted attorney’s fees, finding that the employer had denied a requested benefit, namely permanent total disability benefits. Having denied a claim, the employer was bound to file a notice of denial. Instead of investigating the claim, the employer built a “wall of willful ignorance.”

On appeal, the First District Court of Appeal reversed the award of attorney’s fees. According to the court, the employer is not bound to file a notice of denial when it pays one of two alternative claims for indemnity benefits made in a single petition. The employer paid the temporary total

242. Millerick, 721 So. 2d at 1232.
243. Id.
244. Id. (quoting FLA. STAT. § 440.091(2) (1997)).
245. Id.
246. Id.
247. Millerick, 721 So. 2d at 1232.
249. Id. at 416.
250. Id.
251. Id.
252. Id. (citing FLA. STAT. §§ 440.34(3)(b), .192(8) (1995)).
253. Eaby, 725 So. 2d at 417.
254. Id. (citing FLA. STAT. § 440.192(8)).
255. Id.
256. Id. at 416.
257. Id. at 417.
disability claim and rejected the claim for permanent total disability. Eaby had not reached maximum medical improvement as of the date of the petition for attorney’s fees.

E. Setoffs, Tie-ins with Other Statutes, and Disqualifications

In Heric v. City of Ormond Beach, William Heric worked as a city firefighter. While on vacation, Heric suffered a heart attack. The employer agreed to pay medical and indemnity benefits. The governing collective bargaining agreement addressed the issue of how benefits were to be paid. Under the agreement, claimants were entitled to recover full pay and disability benefits for up to 1008 hours, which comes out to ninety days for firefighters. In the event the cap is exhausted, claimants may seek an extension of “full pay” status. In the face of a petition, the city must convene a panel, which makes a recommendation to the city manager who bears ultimate authority over claimant’s petition. If the petition is turned down, the agreement makes clear that “[t]he employee shall, after utilizing the employee’s annual Personal Leave Time and the employee’s Sick Leave Bank, revert to normal workers’ compensation benefits.”

Heric exhausted his 1008 hours, petitioned the city for a “full pay” status extension, and received full pay through deductions from his sick and personal leave banks until he returned to work on June 2, 1997. At the same time, Heric sought temporary total disability or temporary partial disability benefits. The hearing focused on whether Heric was entitled to benefits for the period after he had exhausted his sick leave and personal leave. The hearing judge denied benefits, citing the collective bargaining agreement, which calls for binding arbitration of such claims as the sole source for a remedy. Florida law favors such alternative dispute

258. Eaby, 725 So. 2d at 416.
259. Id.
261. Id. at 1247.
262. Id.
263. Id.
264. Id.
265. Heric, 728 So. 2d at 1248.
266. Id.
267. Id.
268. Id.
269. Id.
270. Heric, 728 So. 2d at 1248.
271. Id.
272. Id.
resolution systems agreed upon by the parties for resolving workers’ compensation benefits disputes.\textsuperscript{273} As long as the benefits themselves are undiminished, private arbitration conforms to Florida law.\textsuperscript{274}

On appeal, the First District Court of Appeal ruled that the judge’s finding, that the collective bargaining agreement did not diminish Heric’s right to workers’ compensation benefits, was in error.\textsuperscript{275} According to the court, Florida law leaves no doubt that the agreement is nonbinding if it tries to regulate the method of recovering workers’ compensation benefits.\textsuperscript{276} Thus, the agreement undermined Heric’s right to benefits by forcing him to exhaust his personal and sick leave benefits before recovering workers’ compensation benefits.\textsuperscript{277} On remand, the judge was instructed to hold a hearing on the merits of Heric’s claim for benefits for the period in question.\textsuperscript{278} At the same time, the court concluded that the employer may seek to offset against the leave pay awarded to Heric the amount by which the sum of leave pay and workers’ compensation benefits exceeds Heric’s average weekly wage.\textsuperscript{279} Similarly, the judge has discretion to reduce Heric’s sick leave and personal leave benefits by a fraction equivalent to the offset accorded the employer.\textsuperscript{280}

IX. HEALTH BENEFITS

Some states and many local subdivisions of the state provide dependent health benefits to “spousal equivalents” of its public employees. These so-called “domestic partnership” laws meet with opposition on many fronts. For example, on December 9, 1998 the South Florida Water Management District postponed a vote to grant insurance benefits to unmarried partners of its employees in the face of protest by the Christian Coalition.\textsuperscript{281} The District would have been the first Florida agency to offer domestic partnership benefits.\textsuperscript{282} Governor Jeb Bush reportedly opposes

\textsuperscript{273} See FLA. STAT. § 440.211 (1999).
\textsuperscript{274} Id. § 440.211(2).
\textsuperscript{275} Heric, 728 So. 2d at 1249.
\textsuperscript{276} Id.
\textsuperscript{277} Id.
\textsuperscript{278} Id. at 1249–50.
\textsuperscript{279} Id. at 1250.
\textsuperscript{280} Heric, 728 So. 2d at 1250.
\textsuperscript{281} Lori Rozsa, District Puts Off Vote on Partner Benefits, MIAMI HERALD, Dec. 10, 1998, at 6B.
\textsuperscript{282} Id.
granting benefits for unmarried partners.\textsuperscript{283} One board member commented that unelected public officials should not be setting social policy.\textsuperscript{284}

A month after Miami-Dade commissioners narrowly passed a human rights ordinance, Broward County began considering a sweeping domestic partnership law in January, 1999.\textsuperscript{285} Besides offering insurance benefits to domestic partners of county employees, the proposal required independent contractors doing business with the county to do the same.\textsuperscript{286} Heterosexuals living in unmarried partnerships would also qualify under the proposal.\textsuperscript{287} Moreover, unmarried adults could extend their insurance benefits to an elderly parent or other blood relative living in the same household.\textsuperscript{288} A public hearing was set for January 26, 1999.\textsuperscript{289}

An editorial in the \textit{Miami Herald} endorsed the proposed domestic partnership law, but noted that in order to avoid violating Florida’s Defense of Marriage Act,\textsuperscript{290} the proposal defined partnerships as two single people who share expenses and consider themselves a family.\textsuperscript{291} As the editorial pointed out, this definition encompasses a person who wants to register his ill aunt in order to cover her under his county health insurance.\textsuperscript{292}

Even before the public hearing, however, the Broward County Commission considered dropping the provision requiring companies doing business with the county to offer domestic partnership benefits to their employees.\textsuperscript{293} Instead, three commissioners were said to be recommending that companies that do offer such benefits be granted bonus points when they bid on county contracts.\textsuperscript{294} It turned out that the county’s budget office discovered that most private companies that would be affected by the ordinance would be exempt because they are regulated by the federal

\begin{itemize}
  \item \textsuperscript{283} Id.
  \item \textsuperscript{284} Id.
  \item \textsuperscript{285} Lisa Arthur, \textit{Broward Poised to OK Partner Benefits: Not Even Gay Meccas Such as Key West or Miami Beach Have Laws as Sweeping}, \textit{MIAMI HERALD} (Broward), Jan. 17, 1999, at 1A.
  \item \textsuperscript{286} Under the proposal drawn up by the county attorney’s office, “companies that do $50,000 or more in business with the county would have to provide benefits to domestic partners and relatives of gay and unmarried employees.” Jacqueline Charles, \textit{Domestic Partners Plan Faces Revisions, County Contractors May Get Exemption}, \textit{MIAMI HERALD} (Broward), Jan. 24, 1999, at 1BR.
  \item \textsuperscript{287} Arthur, \textit{supra} note 285, at 1A.
  \item \textsuperscript{288} Id.
  \item \textsuperscript{289} Charles, \textit{supra} note 286, at 1BR.
  \item \textsuperscript{290} FLA. STAT. § 741.212 (1999).
  \item \textsuperscript{291} Half a Partnership Broward Effort, \textit{MIAMI HERALD} (Broward), Jan. 17, 1999, at 2L.
  \item \textsuperscript{292} Id.
  \item \textsuperscript{293} Charles, \textit{supra} note 286, at 1BR.
  \item \textsuperscript{294} Id.
\end{itemize}
Employee Retirement Insurance Security Act of 1974 ("ERISA").\textsuperscript{295} For this reason, the ordinance would unduly burden the few companies not covered by ERISA.\textsuperscript{296} The preference system is already in place for women and minorities who bid on county contracts.\textsuperscript{297}

Opposition to the proposed ordinance mobilized immediately.\textsuperscript{298} Concerned Citizens for Broward claimed that the proposal undermines the institution of family and sanctions gay marriages.\textsuperscript{299} In response, the President of the Broward County AFL-CIO, Dan Reynolds, pointed out that most domestic partners are heterosexuals.\textsuperscript{300}

Despite opposition, the Broward County Commissioners passed the domestic partnership ordinance on January 26, 1999, by a vote of six to one.\textsuperscript{301} Broward's ordinance was modeled after similar ordinances in Miami Beach, Key West, and San Francisco.\textsuperscript{302} The final version of the ordinance included a preference system for awarding bonus points to private companies intent on doing business with the county and who offer domestic partner benefits.\textsuperscript{303} About ninety percent of the county's contractors would be exempted because their health insurance plans are governed by ERISA.\textsuperscript{304}

Almost immediately, Wally Lowe, a Broward resident, filed suit challenging the legality of Broward’s ordinance.\textsuperscript{305} Before trial, Broward Circuit Court Judge Robert Andrews heard oral arguments on whether Lowe had standing to bring his lawsuit.\textsuperscript{306} The county attorneys argued that Lowe lacked standing since he was not affected by the ordinance.\textsuperscript{307} At the same hearing, Lowe asked the court to issue a temporary injunction to prevent implementation of any part of the ordinance pending the outcome of his suit.\textsuperscript{308} Meanwhile, the County Commissioners considered eliminating biological relatives from the ordinance after the County's insurer announced that the law would increase rates by thirty percent.\textsuperscript{309} In late March, 1999

\textsuperscript{295.} Id. (citing 29 U.S.C. §§ 1001-1461 (1994)).
\textsuperscript{296.} Id.
\textsuperscript{297.} Id.
\textsuperscript{298.} Charles, supra note 286, at 1BR.
\textsuperscript{299.} Id.
\textsuperscript{300.} Id.
\textsuperscript{301.} Jacqueline Charles, County OKs Domestic Partner Law, 6-1, MIAMI HERALD (Broward), Jan. 27, 1999, at 1B.
\textsuperscript{302.} Id.
\textsuperscript{303.} Id.
\textsuperscript{304.} Id.
\textsuperscript{305.} Id.
\textsuperscript{306.} Jacqueline Charles, County Wins Postponement in Suit Challenging Domestic Partners Plan, MIAMI HERALD (Broward), Mar. 18, 1999, at 2B.
\textsuperscript{307.} Id.
\textsuperscript{308.} Id.
\textsuperscript{309.} Id.
Broward County's Director of Human Resources recommended that the ordinance limit the number of partners that can be added during the year (permitting a change in partners only once every six months) and also recommended omitting blood relatives from the ordinance. The blood relative provision had the potential of raising insurance rates dramatically because, hypothetically, employees could bring someone very ill into the pool. By this time, Judge Andrews ruled that Lowe did have standing to challenge the ordinance under state law. Judge Andrews heard oral arguments on April 21, 1999, while a public hearing was pending on an amended version of the ordinance. At the hearing, Lowe's lawyers argued that the ordinance conflicts with Florida's Defense of Marriage Act, which bans same-sex marriages, and therefore, the County had exceeded its home-rule authority. On April 27, 1999, a public hearing was held and the Commissioners voted to scale back the ordinance by dropping the blood relatives provision. In May of 1999, Judge Andrews ruled in favor of the county, and Lowe filed an appeal.

Finally, Broward County's sweeping new domestic partnership law took effect on July 12, 1999. The ordinance, as amended, extended health insurance benefits to the unmarried partners—homosexual or heterosexual—of county employees, provided the employees register their partners with the county.

X. PENSION AND RETIREMENT BENEFITS

The first bill Governor Jeb Bush signed into law was the Police and Firefighters Pension Act of 1999, amending the law governing the

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311. *Id.*
312. *Id.*
316. Jacqueline Charles, *Broward Judge: Domestic Partnership Law Legal*, MIAMI HERALD (Broward), May 1, 1999, at 3B.
318. *Id.*
disbursement of disability benefits and retirement benefits for public employees.  

A panel that governs the Florida Retirement System announced in December, 1998 that for the first time in years, Florida’s primary pension plan is “fully funded on an actuarial basis.” This means the state can meet their pension obligations as thousands of public employees retire over the coming years. According to an editorial in the Miami Herald, the Florida Retirement System’s assets amount to eighty-five billion dollars—sixty-one percent invested in United States stocks, and twenty-six percent invested in bonds. Meanwhile, the state senate is reviewing whether to allow state employees to opt for a “defined contribution plan” akin to the 401(k) plans prevalent in the private sector.

A recurring issue in public pension law is whether retired public employees who return to public employment must surrender their pension benefits while they work. According to an unofficial opinion issued by Attorney General Gerry Hammond in a May 10, 1999 letter to Plantation City Attorney Don Lunny Jr., and reported in the Miami Herald, Plantation City officials can continue to collect retirement benefits when they reenter public employment. According to this unofficial opinion by Assistant Attorney General Hammond, “it would appear that the city may not deny a retired officer simultaneous payment of retirement benefits and a salary for re-employment with the city.” Even so, Plantation is free to adopt an ordinance forcing the surrender of pension benefits if the retiree rejoins the public workforce.

The question of the legal impact of changing public pension law arose in the case of Bean v. State. The case was triggered by a change in the statutory definition of “joint annuitant” in 1995. George Bean worked for the Hillsborough County Aviation Authority for many years. He retired on July 1, 1996 with over thirty-four years of creditable service with the

322. Id.  
323. Id.  
324. Id.  
325. See generally William T. McGee, Plantation Councilman Can Collect Both Pension and Salary, State Lawyer Says, MIAMI HERALD (Broward), May 26, 1999, at 3B.  
326. Id.  
327. Id.  
328. Id.  
331. Bean, 732 So. 2d at 392.
George and Shirley Bean divorced in 1983. At that time, the State assured George that he could designate both a former wife and a current wife as joint annuitants so long as Shirley was financially dependent on him. In addition, George agreed to pay Shirley alimony equal to forty percent of his gross income. Shirley qualified as a "joint annuitant" until the term was redefined in 1995. Shirley did not, however, qualify as a "joint annuitant" under the new statutory definition. In light of these facts, the court reversed the order of the Division of Retirement and held that George had a vested right to designate Shirley as a "joint annuitant." In support of this conclusion, the court said the key was that George had reached his normal retirement date before the statutory definition was changed. It was irrelevant that he had not yet retired when the new definition took effect.

XI. DISCIPLINE AND DISCHARGE

A. Just Cause

In order to discipline or discharge most public employees, a public employer must have a business justification known as "just cause." What constitutes "just cause" under civil service bears a striking resemblance to "just cause" found in collective bargaining agreements negotiated between public employers and unions representing government employees. Discipline and discharge cases are arguably the largest source of employee grievances. In the public sector, who decides whether to discipline an employee is a key question. Usually, the employer decides in the first instance, and the employee is entitled to contest the discipline before a

332. Id.
333. Id.
334. Id.
335. Id.
336. Until 1995, the "definition of 'joint annuitant' included a person who was financially dependent for at least one-half of his or her support from the retiring member at the time of that member's retirement." Bean, 732 So. 2d at 392 (citing FLA. STAT. §121.091(6)(d) (1993)). This option was dropped in 1995. See FLA. STAT. § 121.091 (1995).
337. Bean, 732 So. 2d at 392.
338. Id. at 392–93.
339. Id. at 392.
340. Id.
342. See id.
344. Id.
neutral decision-maker.\textsuperscript{345} Either a civil service commission or an arbitrator holds a hearing and decides whether the employer, indeed, had just cause to support the discipline.\textsuperscript{346} The losing party at that point either appeals to the Public Employees Relations Commission ("PERC") or to a state court to review the civil service commission or arbitrator's decision.\textsuperscript{347}

Many legal questions can be raised upon review, such as: 1) did the commission or the arbitrator apply the proper evidentiary standard (usually a preponderance of the evidence instead of the higher clear and convincing standard); 2) did the punishment fit the crime; 3) were mitigating factors given proper weight; and 4) does the arbitrator's decision violate public policy?

Many of these issues were raised in cases reviewed by Florida circuit courts of appeal in 1998–99. For example, in \textit{Mathis v. Florida Department of Corrections},\textsuperscript{348} the Department of Corrections ("DOC") tried to dismiss Earnest Mathis, a career service employee with the DOC.\textsuperscript{349} Mathis challenged the proposed discharge by timely filing a notice of appeal with PERC.\textsuperscript{350} PERC reduced the dismissal to a sixty-day suspension, ordered Mathis reinstated, and ruled that he was entitled to back pay for the time he was out of work without ever spelling out the amount of back pay owed to him.\textsuperscript{351} When negotiations stalled, Mathis filed a petition for issuance of a computation of back pay.\textsuperscript{352} PERC denied the petition as late.\textsuperscript{353} On appeal, the court ruled that PERC had no authority to deny Mathis any back pay merely because he failed to meet PERC's deadline, which was not dictated by statute or rule.\textsuperscript{354} In support of this conclusion, the court noted Mathis's good faith efforts to settle the issue with DOC and lack of any prejudice against DOC.\textsuperscript{355}

Several disciplinary cases involve prison guards, or so-called correctional officers.\textsuperscript{356} The \textit{Miami Herald} reported the case of a Miami-
Dade correctional officer who had been disciplined with pay for reportedly forcing an inmate to perform oral sex on him in a jury room at the county courthouse. Although not criminally charged, the eight-year veteran was relieved of duty. The Miami Herald reported that DNA taken from semen found on the victim’s breast tested positive. Police detectives seized the guard’s clothing—even the red underwear that the inmate had minutely described. Sources predicted the guard would be dismissed if the story were true, whether or not he was criminally charged. The article pointed out that if the incident had taken place just three weeks later, the guard could have faced an automatic third-degree felony. A new Florida law, effective July 1, 1999, treats sex between a correction officer and a prisoner as a felony even if it is consensual. In earlier cases in 1998–99, one guard was fired after a prisoner became pregnant with the officer’s baby. Another female guard was dismissed after reportedly performing oral sex on male inmates.

Disciplining prison guards for beating inmates is a recurring issue. The most recent incident allegedly took place in July, 1999 when nine guards were suspended pending a murder investigation into the suspicious death of a known troublemaker, Frank Valdez, a death row inmate on X Wing, the toughest hold for the toughest inmates at the Florida State Prison in Starke, Florida. Two dozen state investigators and FBI agents were investigating the death. The Florida Department of Law Enforcement (“FDLE”) is in charge of the case. The DOC is encouraging the guards to cooperate. Valdez’s death has triggered numerous tips and grievances

357. Id.
358. Id.
359. Id.
360. Id.
361. Acle & Garcia, supra note 356, at 7B.
362. Id.
363. Id. (citing S. Res. 1788, 1999 Reg. Sess. (Fla. 1999) (amending FLA. STAT. § 944.35(3)(b) and creating FLA. STAT. § 951.221)).
364. Acle & Garcia, supra note 356, at 7B.
365. Id.
367. Phil Long & Steve Bousquet, Big Law-Enforcement Team Investigating Death of Inmate, MIAMI HERALD, Aug. 5, 1999, at 9B.
368. Id.
369. Id.
370. Id.
from inmates across the state.\textsuperscript{371} The FBI agents, meanwhile, are working on federal civil rights issues.\textsuperscript{372}

On August 6, 1999 three correctional officer recruits were dismissed as part of the Valdez investigation.\textsuperscript{373} In light of their probationary status, no grounds were given for their dismissal.\textsuperscript{374} Moreover, eleven guards were suspended with pay in the wake of the Valdez death.\textsuperscript{375} But, one of these correctional officers will return to work at the prison owing to his change of heart to cooperate with the investigation.\textsuperscript{376} News reports indicate that one of the guards implicated in the Valdez death has a history of allegations of abuse of inmates.\textsuperscript{377} Six complaints by inmates over a five-year period were found in the personnel file of this guard.\textsuperscript{378} After one of these grievances was confirmed, the guard was suspended "for 60 days without pay for inappropriate use of force" after putting down an inmate skirmish.\textsuperscript{379} Even so, this guard was named Officer of the Month for June 1997.\textsuperscript{380}

In \textit{Dalem v. Department of Corrections},\textsuperscript{381} Anthony Dalem was promoted to correctional officer lieutenant.\textsuperscript{382} While serving as the shift supervisor, he responded to a radio alert that fighting had broken out in the prison dormitories.\textsuperscript{383} Although Dalem arrived after the fight had been broken up, officers Krueger and Arpan testified that Dalem beat inmate Wayne Green, although Green offered no resistance.\textsuperscript{384} Among other things, Dalem allegedly kicked Green in the chest several times and once in the neck, and stood on top of a footlocker, and twice jumped onto Green's back.\textsuperscript{385} Later, Dalem denied he was even at the scene.\textsuperscript{386} The DOC accused Dalem of abuse of an inmate, willful violations of rules and regulations, and giving false testimony.\textsuperscript{387} An evidentiary hearing was held before PERC.\textsuperscript{388}

\textsuperscript{371} \textit{Id.}
\textsuperscript{372} Long & Bousquet, \textit{supra} note 367, at 9B.
\textsuperscript{373} Steve Bousquet, \textit{3 Correctional Recruits Fired in Valdez Case, MIAMI HERALD}, Aug. 6, 1999, at 1B.
\textsuperscript{374} \textit{Id.}
\textsuperscript{375} \textit{Id.}
\textsuperscript{376} \textit{Id.}
\textsuperscript{377} Steve Bousquet, \textit{Guard Accused Repeatedly of Abuse, MIAMI HERALD}, Aug. 7, 1999, at 1B.
\textsuperscript{378} \textit{Id.}
\textsuperscript{379} \textit{Id.}
\textsuperscript{380} \textit{Id.}
\textsuperscript{381} 720 So. 2d 575 (Fla. 4th Dist. Ct. App. 1998).
\textsuperscript{382} \textit{Id.} at 575.
\textsuperscript{383} \textit{Id.}
\textsuperscript{384} \textit{Id.}
\textsuperscript{385} \textit{Id.}
\textsuperscript{386} \textit{Dalem,} 720 So. 2d at 575.
\textsuperscript{387} \textit{Id.} at 576.
The hearing officer found that the DOC had reasonable cause to discharge Dalem for his beating of Green and then lying about his role. Dalem filed an appeal with PERC, which affirmed the hearing officer's ruling.

On appeal, Dalem argued that the hearing officer applied the preponderance of the evidence standard instead of the clear and convincing standard. The court concluded that the hearing officer properly applied the right standard for termination hearings. Dalem also argued that the hearing officer's decision was not supported by competent substantial evidence and that he failed to consider relevant mitigating factors. The court rejected both of these arguments.

The question of what mitigatory criteria PERC may consider in reviewing discipline meted out to a public employee arose in Nordheim v. Department of Environmental Protection. Gregory Nordheim worked as a pilot for the Department of Environmental Protection (“DEP”). In 1991 he sustained injuries in a serious aircraft accident while he was performing several tasks at the same time. Although the plane was destroyed, Nordheim was not disciplined. Nordheim caused another accident while flying surveillance in March, 1997. He failed to lower the landing gear and the plane sustained $5416 worth of damage because he was trying to do too many tasks at once. DEP at first demoted Nordheim to the rank of boat officer, but changed the demotion to a dismissal when it became apparent that Nordheim was physically unable to perform the duties of boat officer in light of his injuries.

Nordheim appealed his dismissal to PERC, which held a three-day hearing. The hearing officer ruled that DEP had cause to fire Nordheim for negligence and that no statutorily prescribed mitigatory criteria applied to

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388. Id.
389. Id.
390. Id.
391. Dalem, 720 So. 2d at 576.
392. Id.
393. Id.
394. Id.
395. 719 So. 2d 1212 (Fla. 5th Dist. Ct. App. 1998), review denied, 729 So. 2d 393 (Fla. 1999).
396. Id. at 1213.
397. Id.
398. Id.
399. Id.
400. Nordheim, 719 So. 2d at 1213.
401. Id. at 1213-14.
402. Id. at 1214.
reduce his dismissal. Upon review, PERC found there were offsetting factors and reduced the punishment from a dismissal to a ninety-day suspension. As for the mitigation criterion that PERC found relevant, "action taken with respect to similar conduct by other employees," PERC concluded that the hearing officer improperly restricted Nordheim's evidence dealing with earlier incidents of negligence that did not result in discipline. For this reason, PERC ruled that Nordheim's punishment amounted to disparate treatment by his employer.

On appeal, the court reversed PERC's ruling because PERC refused to take into account its own case of Jackson v. Department of Juvenile Justice, which made clear that a new agency is not bound by earlier disciplinary actions taken by its predecessor. The three employees PERC compared to Nordheim all sustained accidents with DEP's predecessor, the Florida Marine Patrol. The court ruled that PERC abused its discretion in refusing to take into account the rule in Jackson and that the decision was "[i]nconsistent with officially stated agency policy or a prior agency practice" not accounted for by PERC. The issue of mitigation grounded on the lack of discipline of former workers for analogous misconduct was raised before the hearing officer. The court remanded the case to PERC to reconsider the hearing officer's findings and to take into account the rule in Jackson.

In Cephas v. Department of Health & Rehabilitative Services, John Cephas worked for the Florida Department of Health and Rehabilitative Services ("HRS") as an interviewing clerk for a program that issued checks for buying food. In this capacity, Cephas issued four checks to Tawanda Baker, a client of the program. Later, Baker applied for an apartment, indicating she was a HRS employee and that Cephas was her supervisor. In verifying Baker's employment, the leasing agent spoke to a male who

404. Nordheim, 719 So. 2d at 1214.
406. Nordheim, 719 So. 2d at 1214.
407. Id.
409. Nordheim, 719 So. 2d at 1214.
410. Id.
411. Id. (citing Fla. Stat. § 120.68(6)(e)3 (Supp. 1996)).
412. Id.
413. Id. at 1215.
414. 719 So. 2d 7 (Fla. 2d Dist. Ct. App. 1998), review denied, 729 So. 2d 390 (Fla. 1999), and review denied, 729 So. 2d 394 (Fla. 1999).
415. Id. at 8.
416. Id.
417. Id.
identified himself as Mr. Cephas and represented that he was Baker’s supervisor and that Baker was an able employee. The next day, unable to reach Baker at home, the agent called the HRS office in Plant City and learned that Baker did not work there. It turns out that Cephas was not Baker’s supervisor, and based on these facts, HRS dismissed Cephas for misconduct. On appeal to PERC, the hearing officer affirmed HRS’s action and PERC ratified the recommendation.

On appeal, the court ruled that the evidence was not adequate to support a finding of misconduct because the leasing agent never nailed down Cephas’s identity as the person whom she talked to about Baker. According to the court, telephone conversations are only reliable evidence if “the identity of the person with whom the conversation was had is established by direct evidence, facts or circumstances.” In short, HRS could not assume the person who answered Cephas’s phone was in fact Cephas without corroborative facts.

When a public employee is disciplined “for cause,” what kinds of defenses may the employee raise to undercut the employer’s case? In Doyle v. Department of Business & Professional Regulation, Elizabeth Doyle worked as a special agent with the Division of Alcoholic Beverages and Tobacco (“ABT”), an arm of the Department of Business and Professional Regulation. Doyle’s coworker accused her of unbecoming conduct and sexual harassment, and Doyle was placed on administrative leave. In an interview, Doyle denied ever using vulgar language, but later amended her answer to admit she used “common squad room language.” ABT fired Doyle: 1) “for lying,” 2) for “unbecoming conduct,” and 3) “for using

418. Id.
419. Cephas, 719 So. 2d at 8.
420. Id.
421. Id.
422. Id.
423. Id. (quoting Zeigler v. State, 402 So. 2d 365, 374 (Fla. 1981)).
424. Cephas, 719 So. 2d at 9 (citing Mack v. Widrowicz, 556 So. 2d 1221 (Fla. 4th Dist. Ct. App. 1990)).
426. Id. at 1041.
427. Id. at 1042.
428. Id.
429. Id. n.2 (citing FLA. ADMIN. CODE ANN. r. 61-2.010 (1990)). The code defines unbecoming conduct as:

Any willful action or conduct by an employee which impedes the Department’s efforts, brings discredit on the Department, impairs the operation or efficiency of the Department or any employee, impairs the employee’s ability to perform his or her job, or results in the reluctance or refusal on the part of others to work with the employee.
vulgar or abusive language.\textsuperscript{430} PERC convened a formal hearing,\textsuperscript{431} and Doyle raised the defense of condonation, asserting that the agency condoned vulgar and sexually explicit language in the ABT offices.\textsuperscript{432} Moreover, Doyle stated that ABT workers regularly posted on their office walls sexually explicit, pornographic and vulgar signs, pictures, and jokes.\textsuperscript{433} PERC's hearing officer agreed with Doyle's defense of condonation to the improper language charge.\textsuperscript{434} Before Doyle could be disciplined for using vulgar language, the agency owed her notice that future use of such improper language was grounds for discipline.\textsuperscript{435} The hearing officer ruled that Doyle met her burden of proving the defense of condonation and that the agency lacked just cause to discipline her for abusive language.\textsuperscript{436} Left intact, however, were four other charges of unbecoming conduct, but the hearing officer nevertheless reduced the discipline to a sixty-calendar-day suspension.\textsuperscript{437}

PERC remanded the case to the hearing officer to clarify the lying charge.\textsuperscript{438} The hearing officer ruled that "when Doyle denied using vulgar or sexually explicit language at the office in front of other employees, during the investigation, she was lying to Harris."\textsuperscript{439} PERC affirmed the hearing officer's findings but agreed with the agency that lying during an internal investigation about her job-related conduct warranted Doyle's dismissal.\textsuperscript{440}

On appeal, Doyle alleged due process violations which the court rejected in light of the 1998 Supreme Court decision in La Chance v. Erickson\textsuperscript{441} which held that due process does not encompass the right of the employee "to 'put the government to its proof' by falsely denying the charged conduct, or 'a right to make false statements with respect to the charged [mis]conduct,' in an agency investigation."\textsuperscript{442} In response, Doyle contends that article I, section 9 of the Florida Constitution grants stronger

\textsuperscript{430} Doyle, 713 So. 2d at 1043 n.2 (quoting Fla. Admin. Code Ann. r. 62-2.010).
\textsuperscript{431} Id. at 1042-43.
\textsuperscript{432} Id. (according to Fla. Stat. § 120.57(1) (1995)).
\textsuperscript{433} Id.
\textsuperscript{434} Doyle, 713 So. 2d at 1043.
\textsuperscript{435} Id.
\textsuperscript{436} Id.
\textsuperscript{437} Id. at 1044.
\textsuperscript{438} Id.
\textsuperscript{439} Doyle, 713 So. 2d at 1044.
\textsuperscript{440} Id.
\textsuperscript{441} 522 U.S. 262 (1998).
\textsuperscript{442} Doyle, 713 So. 2d at 1044 (quoting La Chance v. Erickson, 522 U.S. 262, 266 (1998)) (internal citations omitted).
due process protection than the United States Constitution. Sidestepping Doyle's argument altogether, the court concluded that there was insufficient evidence that Doyle ever lied. Doyle's later explanation of her denial of ever using vulgar language raised facts implicating her condonation defense. So, as the court phrased it, Doyle's "denial was merely a legal conclusion or a matter of personal opinion which should not be punishable as a lie." In reaching this conclusion, the court relied on caselaw interpreting perjury. In this context, Doyle's "denial was merely an assertion of her legal defense—a legal conclusion or a matter of personal opinion—not a statement of fact." The court remanded the case to PERC for further proceedings consistent with its opinion.

In City of Tallahassee v. Big Bend Police Benevolent Association, the City fired Thomas Maureau, a lieutenant in the Tallahassee Police Department, for engaging in alleged sex acts while on duty and then lying about it. Under a collective bargaining agreement, Maureau was entitled to file a grievance and go to arbitration. At the conclusion of an evidentiary hearing, the arbitrator upheld only one of the City's charges, lying, and reinstated Maureau after a four-month suspension without pay. The City appealed and urged the trial court to overturn the arbitrator's award. Florida law provides that:

(1) Upon application of a party, the court shall vacate an [arbitrator's] award when:
   (a) The award was procured by corruption, fraud or other undue means.
   (b) There was evident partiality . . . .  

443. Id. at 1045 (citing Traylor v. State, 596 So. 2d 957 (Fla. 1992)).
444. Id.
445. Id.
446. Id.
447. Doyle, 713 So. 2d at 1045.
448. Id. at 1046.
449. Id. (quoting Bronston v. United States, 409 U.S. 352, 362 (1973)).
450. Id.
452. Id. at 214–15.
453. Id. at 215.
454. Id.
455. Id.
456. Big Bend, 710 So. 2d at 215.
(c) The arbitrators or the umpire in the course of her or his jurisdiction exceeded their powers.

(d) The arbitrators... refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of s. 682.06, as to prejudice substantially the rights of a party.

(e) There was no agreement or provision for arbitration subject to this law ....

On appeal, the City argued that the arbitrator exceeded his authority by erroneously adopting a clear and convincing evidentiary standard instead of the preponderance of the evidence standard. The First District Court of Appeal ruled that even if true, adoption of the stricter standard falls short of legal grounds for vacating the arbitrator's award under section 682.13(1), of the Florida Statutes. The court also rejected the City's claim that reinstating Maureau violated public policy because police officers must possess good moral character. Since the arbitrator found insufficient evidence of a romantic relationship with another police officer, public policy was not violated.

A concurring opinion by Judge Booth made clear that arbitrators are not free to adopt the heightened burden of proof in disciplinary cases, but he did not think the issue had been preserved below.

B. Misconduct by Public Officials

In Hamidullah v. Burke, Governor Lawton Chiles suspended Miami-Dade County District Two Commissioner James C. Burke from his seat on the Miami-Dade County Commission, pursuant to article IV, section 7 of the Florida Constitution. Burke had been indicted on federal public corruption charges. He resigned and a special election was held to fill the vacancy on the commission. Despite his indictment and suspension, Burke declared himself a candidate for his old seat, prompting voters to go to

458. Big Bend, 710 So. 2d at 215.
459. Id.
460. Id.
461. Id.
462. Id. at 216.
464. Id. at D675–76.
465. Id. at D676.
466. Id. at D675.
court to stop him from running.467 The circuit court for Dade County refused to stop Burke from running.468

On appeal, the Third District Court of Appeal affirmed the trial court’s ruling.469 Nothing in the state constitution or in Florida’s statutes renders Burke ineligible to run for office.470 Absent constitutional or statutory prohibition, only the legislature is authorized to set eligibility standards for public office.471 The court refused to encroach on the power of the electorate, of the Governor, and of the legislature.472 The court rejected the argument that article IV, section 7 of the Florida Constitution dictates that a suspended official may not run for his office until acquitted.473 At most, that provision empowers the Governor to suspend a public official indicted for a crime until he is acquitted.474 To be sure, the court noted that the Governor still has the power to suspend Burke again should he win the election.475

Defamation of political candidates uttered by anyone during campaigns received attention from the Florida Legislature in 1999.476 The House Judiciary Committee debated the relative merits of a proposed bill that would hold “all persons accountable for the truthfulness of their statements regarding candidates.”477 The bill, proposed by Representative Bill Posey, R-Rockledge, would set up an administrative agency to oversee truth and would “put those who falsely claim that a candidate violated this law at peril of criminal felony charges.”478 In an editorial, the Miami Herald criticized the bill as flawed in two respects: “It is of dubious constitutionality, and it fails to deal with some of the ugliest aspects of campaigns, such as clever distortions and ethnic or racial pandering.”479 The editorial regarded the bill as weakening the current United States Supreme Court standard for libel by holding someone liable for making statements they should have known were false.480 Under the federal standard, actual malice, and not mere negligence must be proved.481

467. Id. at D675–76.
468. Hamidullah, 23 Fla. L. Weekly at D675.
469. Id. at D676.
470. Id.
471. Id.
472. Id.
473. Hamidullah, 23 Fla. L. Weekly at D676.
474. Id.
475. Id.
477. Id.
478. Id.
479. Id.
480. Id.
In *United States v. Starks*, community health aides working for HRS and the president of a drug treatment provider were convicted for violating the anti-kickback provision of the Social Security Act. When they started working at HRS, the public employees were warned about accepting any outside employment giving rise to a conflict of interest and were told to report any outside employment to HRS. The public employees agreed to refer patients to the drug treatment business for $250 per patient without reporting their referral arrangement to HRS. At trial, some of the referrals testified that the HRS employees threatened that HRS would take away their babies if they did not go in for treatment for their drug addictions. In sum, the two HRS employees referred eighteen women and were paid $323,023 in Medicaid payments. The United States District Court for the Middle District of Florida sentenced Starks to two concurrent terms of thirty months of home detention.

On appeal, the HRS employees argued that the jury should have been instructed that, because of the Anti-Kickback statute's mens rea component, the employees had to have known that their referral arrangement violated the federal statute before they could be convicted. The Eleventh Circuit's jury instruction for the term "willfully" reads: "The word willfully, as that term is used from time to time in these instructions, means the act was committed voluntarily and purposely, with the specific intent to do something the law forbids, that is with a bad purpose, either to disobey or disregard the law." The Eleventh Circuit also cited the Supreme Court decision in *Bryan v. United States*, which made clear that a jury may find a defendant guilty of willfully violating a statute if it thinks "that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." In other words, the willfulness requirement does not amount to an exception to the general rule that ignorance of the law is no excuse; knowledge that behavior is unlawful is enough. The giving or taking of kickbacks for medical referrals is clearly illegal, indeed, close to

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482. 157 F.3d 833 (11th Cir. 1998).
483. *Id.* at 835; *see* 42 U.S.C. § 1320a-7b(b) (1994).
484. *Starks*, 157 F.3d at 836.
485. *Id.*
486. *Id.* at 837.
487. *Id.*
488. *Id.*
489. *Starks*, 157 F.3d at 837.
490. *Id.* at 837–38.
493. *Id.* (citing *Bryan v. United States*, 524 U.S. 184, 195 (1998)).
malum in se. The court upheld the trial court’s jury instruction on the meaning of the word “willful.”

As for the vagueness challenge, a criminal statute must define the crime with a degree of clarity to put ordinary people on notice what behavior is banned. The Eleventh Circuit concluded that the Anti-Kickback statute was not vague, citing Supreme Court criteria: “whether the statute (1) involves only economic regulation, (2) provides only civil, rather than criminal, penalties, (3) contains a scienter requirement mitigating vagueness, and (4) threatens any constitutionally protected rights.” Applying these factors, the court reasoned that the Anti-Kickback statute regulates only economic behavior and does not violate any constitutional rights. In sum, the HRS employees had adequate notice that their behavior was unlawful.

Another case drawing a distinction among classes of public employees was Service Employees International Union v. Public Employees Relations Commission. Patricia O’Brien worked as a deputy court clerk in Orlando when she was fired, allegedly because she “reported and was paid for more hours than she actually worked on repeated occasions.” By contrast, O’Brien contends she was terminated because of her union activities. O’Brien filed an unfair labor practice charge with PERC, which sustained her discharge.

On appeal, the Fifth District Court of Appeal framed “the issue [as] whether a deputy court clerk is in fact a ‘public employee’” under article I, section 6 of the Florida Constitution and section 447.203(3) of the Florida Statutes. The Clerk of Court appoints, rather than employs, deputy clerks. Earlier precedent judged deputy court clerks not to be public employees. The court grudgingly agreed, but urged the state supreme court to address the question.

494. Id.
495. Id. at 839.
496. Id.
498. Id. at 840.
499. Id.
500. 720 So. 2d 290 (Fla. 5th Dist. Ct. App. 1998), review granted, 732 So. 2d 328 (Fla. 1999).
501. Id. at 291.
502. Id.
503. Id.
504. Id.
505. Service Employees Int’l Union, 720 So. 2d at 291.
506. Id. (citing Federation of Pub. Employees v. Public Employees Relations Comm’n, 478 So. 2d 117 (Fla. 4th Dist. Ct. App. 1985)).
507. Id.
C. **Whistle-blowing and Retaliatory Discharge**

Florida has enacted a Whistle-blower’s Act,\(^{508}\) aimed at protecting public employees who report or disclose employment-related wrongdoing, usually by management.\(^{509}\) The law shields employee disclosure of past, present, or potential wrongdoing by supervisors, coworkers, or public employers.\(^{510}\)

Several cases raised the question whether the whistle-blower has exhausted administrative channels of relief.\(^{511}\) The Florida Whistle-blower’s Act, provides, in part:

Within 60 days after the action prohibited by this section, any local public employee protected by this section may file a complaint with the appropriate local governmental authority, if that authority has established by ordinance an administrative procedure . . . Within 180 days after entry of a final decision by the local governmental authority, the public employee who filed the complaint may bring a civil action in any court of competent jurisdiction. If the local governmental authority has not established an administrative procedure by ordinance or contract, a local public employee may, within 180 days after the action prohibited by this section, bring a civil action in a court of competent jurisdiction.\(^{512}\)

In *City of Miami v. Del Rio*,\(^{513}\) a City of Miami police officer “blew the whistle” on his superiors over the legality of certain orders by disclosing the alleged wrongdoing to other public agencies, including the state attorney.\(^{514}\) In response, Del Rio alleges that his superiors retaliated against him.\(^{515}\) Del Rio went to court, suing the City, the Chief of Police, and three of his superior officers, for violations of the Whistle-blower’s Act.\(^{516}\) Del Rio claimed he had exhausted all administrative remedies.\(^{517}\)

On appeal, Del Rio changed his argument, alleging that there was no administrative remedy since the board he went to denied him a hearing by

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508. FLA. STAT. § 112.3187 (1999).
509. *See id.*
510. *See id.*
511. *See City of Miami v. Del Rio, 723 So. 2d 299, 300 (Fla. 3d Dist. Ct. App. 1998), review denied, 733 So. 2d 515 (Fla. 1999).*
512. FLA. STAT. § 112.3187(8)(b).
513. 723 So. 2d 299 (Fla. 3d Dist. Ct. App. 1998).
514. *Id.* at 300.
515. *Id.*
516. *Id.*
517. *Id.*
delay tactics and, therefore, he was free to bypass the administrative route and go directly to court.\textsuperscript{518} For its part, the City contends that its code established an administrative board\textsuperscript{519} with the power to hear whistle-blower complaints, but that Del Rio abandoned his complaint before the board rendered its decision.\textsuperscript{520} In other words, Del Rio failed to exhaust his administrative remedy and forfeits the right to go to court.\textsuperscript{521} The Third District Court of Appeal ruled that the Civil Service Board met the requirements of the Whistle-blower's Act, and therefore, Del Rio must first exhaust his remedy before the Board.\textsuperscript{522} The Board delayed its proceedings to secure additional information from Del Rio who, instead of complying with the board's request, abandoned his petition and filed for judicial relief.\textsuperscript{523} Del Rio's suit was deemed premature.\textsuperscript{524}

In \textit{Dinehart v. Town of Palm Beach},\textsuperscript{525} Mary Dinehart worked in the finance department of the Town of Palm Beach and took part in an investigation of her supervisor, but the town council decided against firing the supervisor.\textsuperscript{526} In the aftermath, Dinehart was transferred to another department, which prompted her suit against the town under the public Whistle-blower's Act.\textsuperscript{527} The circuit court for Palm Beach County granted summary judgment in favor of the Town because the Town had set up an administrative procedure for reviewing whistle-blower claims, and Dinehart had failed to go through that board.\textsuperscript{528}

On appeal, the Fourth District Court of Appeal framed the issue as whether Dinehart had exhausted her administrative remedies before filing suit.\textsuperscript{529} Dinehart argued that the Town's administrative procedure did not meet the legal requirements set out in section 112.3187(8)(b) of the \textit{Florida Statutes}.\textsuperscript{530} Under the town's procedures, employees must first discuss their complaint with their immediate supervisor unless the complaint deals with a suspension, demotion, or dismissal.\textsuperscript{531} Next, workers should take their

\textsuperscript{518} Del Rio, 723 So. 2d at 300.
\textsuperscript{519} Id. at 300. "The City contends its Civil Service Board...as set forth in section 36(a), Miami, Fla., Charter, meets the requirements of [the Whistle-blower's Act]." Id. (citations omitted).
\textsuperscript{520} Id. at 301.
\textsuperscript{521} Id.
\textsuperscript{522} Del Rio, 723 So. 2d at 301.
\textsuperscript{523} Id.
\textsuperscript{524} Id.
\textsuperscript{525} 728 So. 2d 360 (Fla. 4th Dist. Ct. App. 1999).
\textsuperscript{526} Id. at 360.
\textsuperscript{527} Id.
\textsuperscript{528} Id. at 361.
\textsuperscript{529} Id. at 362.
\textsuperscript{530} Dinehart, 728 So. 2d at 361 (citing FLA. STAT. § 112.3187(8)(b) (1995)).
\textsuperscript{531} Id.
grievance to the department head. 532 Third, employees should appeal to a grievance resolution board. 533 If the complaint deals with a suspension, demotion, or dismissal, however, workers must "proceed directly to the grievance resolution board," which then "submits its recommendation to the town counsel for action." 534

It is clear from the face of the Whistle-blower’s Act that the legislature left the details of the procedure up to the town, so long as complaints are heard by a panel of impartial decision-makers, and the procedure otherwise abides by due process. 535 The court concluded that even though the town’s procedure did not guarantee an impartial panel, its procedure duly satisfies the Act’s criteria. 536 Moreover, the town’s procedure requires findings by the grievance committee to be submitted to the town council. 537 In sum, Dinehart failed to exhaust the administrative remedies. 538

In Harris v. District Board of Trustees, 539 coordinators of a criminal justice program run by a community college, who were fired, sued the college, and its president, among others, claiming that their termination was in retaliation for their whistle-blowing acts. 540 The alleged wrongdoing involved irregularities and departures from law and policy going on in the college’s Criminal Justice Training Program. 541 Shattler was the program’s manager. 542 The plaintiffs alleged that he took no action in response to their complaints, so they took their case to the Florida Department of Law Enforcement ("FDLE"). 543 During FDLE’s investigation of the program, Buckley, the director of the division of career and special programs fired Harris, allegedly on financial grounds. 544 Other acts of retaliation include: unwarranted criticism; verbal abuse; searches through personal papers, such as a diary; and negative performance evaluations. 545

The Federal District Court for the Middle District of Florida reached the following conclusions: 1) the plaintiffs established that the college president had violated their First Amendment rights; 2) the plaintiffs’ speech

532. Id.
533. Id.
534. Id.
535. Dinehart, 728 So. 2d at 361.
536. Id.
537. Id.
538. Id. at 362.
539. 9 F. Supp. 2d 1319 (M.D. Fla. 1998).
540. Id. at 1319.
541. Id. at 1322.
542. Id.
543. Id.
544. Harris, 9 F. Supp. 2d at 1322.
545. Id.
touched on matters of public concern; 3) the college president was not acting within the scope of her discretionary authority to trigger qualified immunity; 4) the time for filing a lawsuit under the Florida Whistle-blower’s Act began when the plaintiffs read a newspaper interview in which they were blamed for problems in the program; 5) the persons in their individual capacities are not liable under the state whistle-blower law; 6) the plaintiffs satisfied the whistleblower’s act when they sent their memo to FDLE, since it supervised the criminal justice instruction; 7) the plaintiffs also established false light invasion of privacy (the newspaper account is arguably highly offensive to a reasonable person and the supervisor made his comments with a reckless disregard for their truth); 8) the plaintiffs did not state a § 1983 claim; and 9) the Eleventh Amendment bars a suit against a community college.

However, not all retaliation cases implicate a whistle blower’s act. For example, in Barron v. Public Health Trust, Joseph Barron refused to lend his hand in an alleged altering and discarding of patient care plans and other medical records when he worked for the Public Health Trust because he believed such conduct to be illegal. Barron shared his concerns with the Vice President of Satellite Services for the Trust. Retaliation took the form, Barron alleged, of the transferring of one of his subordinates to another department, and of threatening to force Barron to work at night. After Barron returned to work, following an approved medical leave, the director refused to accommodate Barron’s impaired condition. Barron regarded this refusal as a constructive discharge that left him no choice but to resign his job with the Trust.

Barron sued the Trust in the District Court for the Southern District of Florida alleging free speech violations under § 1983 of title 42 of the United States Code and article I, section 4 of the Florida Constitution. Defendant Reardon claimed qualified immunity from suit given that Barron’s speech did not bear on a matter of public concern. He also claimed that Barron’s speech rights were outweighed by his employer’s interest in running an efficient agency, and that the alleged retaliation did not qualify as an

549. Id. at 1369.
550. Id.
551. Id.
552. Id.
553. Barron, 22 F. Supp. 2d at 1369–70.
554. Id. at 1370.
555. Id.
“adverse employment action under the First Amendment.” The court only addressed whether the alleged retaliation constituted adverse employment action under the First Amendment.

The federal district court concluded that the alleged acts of retaliation did not rise to the level of an adverse employment action under the First Amendment. Transferring one of Barron’s subordinates and threatening to force Barron to work at night are not manifestly illegal retaliation under the First Amendment. As for the constructive discharge, Barron voluntarily resigned when his supervisor properly refused to accommodate his disability. Barron’s supervisor never suggested that Barron resign, nor did he threaten to terminate him. In sum, Barron’s working conditions were not so intolerable that he had no choice but to quit. For purposes of qualified immunity, Reardon’s actions did not clearly amount to adverse employment. Reardon’s codefendant, Ward, enjoyed an even stronger claim to qualified immunity because, at worst, Ward failed to end Reardon’s alleged acts of retaliation. Since Reardon is entitled to qualified immunity, a fortiori, so is Ward.

In Dade County Police Benevolent Ass’n v. Town of Surfside, the police union filed an unfair labor practice with PERC, alleging that the Town of Surfside fired Officers Marchese and Casabo for engaging in protected activity, specifically, their support of a union-sponsored survey dealing with the Town’s police department. At PERC’s hearing, one witness testified that the dismissed officers coerced and intimidated other officers, unlawfully disrupted the investigation, and lied to the investigators. The police chief made clear that he did not discharge the officers for engaging in protected activity. The hearing officer concluded, and PERC’s final order affirmed, that the officers were dismissed for cause.

556. Id.
557. Id.
559. Id.
560. Id. at 1371.
561. Id.
562. Id.
564. Id. at 1373.
565. Id.
566. 721 So. 2d 746 (Fla. 3d Dist. Ct. App. 1998).
567. Id. at 746.
568. Id.
569. Id. at 746–47.
570. Id. at 747.
On appeal, the police union claimed that the hearing officer accorded undue weight to hearsay evidence. Rejecting this argument, the Third District Court of Appeal ruled that the documents at issue were not introduced to prove the truth of the matter asserted, but only to prove the employer's state of mind in firing the officers. The dismissals were upheld.

An article in the Miami Herald reported on a couple of retaliation cases involving public employees. In one, Florida's Department of Environmental Protection ("DEP") reached a settlement with a public employees' union entitling workers to express professional opinions without fear of retaliation. Moreover, DEP agreed to lobby for legislation aimed at protecting public employees against intimidating lawsuits by developers. Another article in the Miami Herald reported on a lawsuit filed by a City of Miramar Police Captain against the City. The police captain alleged that he was demoted after he told the Miami Herald that a high profile company, which had made campaign contributions to city commissioners, was awarded a towing contract, even though it overcharged residents. The City denied the charge, claiming that the demotion was wholly a fiscal decision.

D. Procedural Due Process

When is a public agency required to process an employee's grievance? This issue was addressed in Soto v. Board of County Commissioners. Soto was a county employee who sued the county for refusing to process a grievance he had filed. According to the county's own grievance procedure, any violation of personnel regulations would trigger the grievance procedure. The reviewing court made clear that "where a governmental agency provides that employee disputes shall be resolved through a grievance process, the agency is bound to fully comply with its own rules.

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571. Dade County Police Benevolent Ass'n, 721 So. 2d at 747.
572. Id.
573. Id.
574. Environmental Employees Settle Dispute with State, MIAMI HERALD, Apr. 14, 1999, at 5B.
575. Id.
576. Id.
577. Id.
578. Id.
579. Id.
580. 716 So. 2d 863 (Fla. 5th Dist. Ct. App. 1998).
581. Id. at 864.
582. Id.
and policies." The regulations also contain an anti-retaliation provision, and Soto claims that he was denied a promotion because of an earlier grievance that he had filed. The Fifth District Court of Appeal issued a writ of mandamus to force the Board of County Commissioners to process Soto’s grievance in accordance with its own procedures.

Is due process violated if PERC refuses to consider an appeal that is untimely filed? In Ford v. Public Employees Relations Commission, PERC affirmed Ford’s dismissal as a probation officer. Ford’s court appeal of PERC’s decision was dismissed because it was late. So, Ford asked PERC to allow him to file a belated appeal. PERC turned Ford down, asserting that only an appellate court can authorize a belated appeal.

On appeal, citing Supreme Court of Florida precedent, the court recognized egregious circumstances preventing a litigant from filing on time and that either PERC or an appellate court was authorized to permit the belated appeal. For example, due process is violated if PERC’s order had been entered, but never transmitted to the litigant, and the time to file an appeal expires. But, the court affirmed PERC’s dismissal of Ford’s untimely appeal, anyway, because Ford never alleged that his counsel did not receive notice.

E. First Amendment

1. Free Speech: Matters of Public Concern

Public employees need not check their constitutional rights of free speech at the workplace door. Whether speech by a public employee is

583. Id. (citing Fredericks v. School Bd. of Monroe County, 307 So. 2d 463 ( Fla. 3d Dist. Ct. App. 1975)).
584. Id. at 864.
585. Soto, 716 So. 2d at 865.
586. 717 So. 2d 149 (Fla. 5th Dist. Ct. App. 1998).
587. Id. at 150.
588. Id.
589. Id.
590. Id.
591. Ford, 717 So. 2d at 150 (citing Millinger v. Broward County Mental Health Div., 672 So. 2d 24, 27 (Fla. 1996)).
592. Id.
593. Id.
594. Id.
entitled to First Amendment protection, however, often turns on whether it is speech on a matter of public concern.\textsuperscript{596}

An article in the \textit{Miami Herald} reported on a tenured Florida State University ("FSU") psychology professor, who came under fire after it surfaced that he wrote a glowing introduction to \textit{My Awakening}, the autobiography of David Duke, a former Ku Klux Klan grand wizard and state representative in Louisiana.\textsuperscript{597} The right to free speech and academic freedom is pitted against the impulse to censor views repugnant to most people who make up the FSU community.\textsuperscript{598} FSU's president is on record as a defender of free speech in an academic community.\textsuperscript{599} Some have accused the professor of "racial harassment" of African-American students, but a review of the professor's grading record turned up no evidence of bias against minority students.\textsuperscript{600} Although the professor's specialty is genetic research involving mice, his racial views have been dismissed as "junk science."\textsuperscript{601} In an editorial, the \textit{Miami Herald} dismissed the professor's racial views as claptrap and an embarrassment to FSU, but made clear that the First Amendment and academic freedom protect him.\textsuperscript{602}

In \textit{Huerta v. Hillsborough County},\textsuperscript{603} Henry Huerta worked for Hillsborough County for seventeen years as Executive Manager of the Office of Consumer Affairs and Child Care Licensing.\textsuperscript{604} On June 9, 1991, the \textit{Tampa Tribune} quoted Huerta in an article that criticized the County's childcare licensing program.\textsuperscript{605} Two days later, Huerta was dismissed, and he sued the County and Pat Gray Bean, the person who fired him.\textsuperscript{606}

On appeal, the issue turned on whether Bean was entitled to qualified immunity.\textsuperscript{607} Under the law "a government official...is entitled to qualified immunity from civil suit in the performance of discretionary functions when the official's conduct does not violate any clearly established statutory or constitutional right of which a reasonable person should have

\textsuperscript{596} \textit{Pickering}, 391 U.S. at 573.

\textsuperscript{597} \textit{Herald Staff, The Right to Be Wrong On Controversial Issues, MIAMI HERALD}, Apr. 6, 1999, at 18A.

\textsuperscript{598} \textit{Id.}

\textsuperscript{599} \textit{Id.}

\textsuperscript{600} \textit{Id.}

\textsuperscript{601} \textit{Id.}

\textsuperscript{602} \textit{The Right to Be Wrong on Controversial Issues, supra note 597, at 18A.}

\textsuperscript{603} 720 So. 2d 276 (Fla. 2d Dist. Ct. App. 1998).

\textsuperscript{604} \textit{Id. at 276.}

\textsuperscript{605} \textit{Id. at 276–77.}

\textsuperscript{606} \textit{Id. at 277.}

\textsuperscript{607} \textit{Id.}
known."\textsuperscript{608} The trial court ruled that under this standard, Bean was entitled to qualified immunity.\textsuperscript{609} On appeal, the Second District Court of Appeal reversed the trial court's grant of qualified immunity to Bean.\textsuperscript{610}

The appellate court's decision stemmed from its conclusion that Huerta's speech touched on a matter of public concern.\textsuperscript{611} At that point, the employee's interest in speaking freely must be weighed against the employer's interest in running an efficient agency.\textsuperscript{612} Applying the \textit{Pickering v. Board of Education}\textsuperscript{613} balancing test, the court left no doubt that Huerta's First Amendment right outweighed any employer interest.\textsuperscript{614}

Huerta spoke on the issue of licensing and inspection of day care facilities. Not only was Huerta the executive manager for child care licensing and qualified to make an informed opinion on the issue as it existed in Hillsborough County, but the subject is also one of public importance affecting numerous families in the County. There is nothing in the record to suggest that the statements made by Huerta were false or that they in any way impeded the proper performance of his duties . . . . \textsuperscript{[T]here is nothing to suggest that the termination was justified in light of any competing social interests.}\textsuperscript{615}

In \textit{Martin v. Baugh},\textsuperscript{616} Martin worked for the City of Birmingham as a communications technician who was concerned about the bidding process to upgrade the City's communications system.\textsuperscript{617} Martin shared his concerns with a member of the City Council, Blake, and the Birmingham chapter of the Fraternal Order of Police ("FOP").\textsuperscript{618} Later, Martin testified in a suit that arose between two bidders over the city rigged bidding process.\textsuperscript{619} Martin never cleared his whistleblowing with his supervisor, Baugh.\textsuperscript{620} Upon learning of Martin's disclosures, Baugh accused Martin of insubordination

\begin{itemize}
  \item \textsuperscript{608} \textit{Huerta}, 720 So. 2d at 277 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
  \item \textsuperscript{609} Id.
  \item \textsuperscript{610} Id. at 278.
  \item \textsuperscript{611} Id.
  \item \textsuperscript{612} Id.
  \item \textsuperscript{613} 391 U.S. 563 (1968).
  \item \textsuperscript{614} \textit{Huerta}, 720 So. 2d at 278.
  \item \textsuperscript{615} Id.
  \item \textsuperscript{616} 141 F.3d 1417 (11th Cir. 1998), \textit{cert. denied}, 119 S. Ct. 870 (1999).
  \item \textsuperscript{617} Id. at 1419.
  \item \textsuperscript{618} Id.
  \item \textsuperscript{619} Id.
  \item \textsuperscript{620} Id.
\end{itemize}
and urged him to resign. Martin also received a reprimand, and some of his duties were assigned to a coworker. Depressed by this turn of events, Martin took a leave of absence. Martin then sued the City, the Mayor, and Baugh, alleging that his disclosures were protected by the First and Fourteenth Amendments. Among other things, the district court ruled that Baugh was not entitled to qualified immunity.

On appeal, the sole issue concerned Martin's claim for damages against Baugh in his individual capacity. To receive the protection of qualified immunity, Martin must prove that his First Amendment right Baugh violated was "clearly established" when Baugh disciplined him. The court concluded that Martin fell short of his burden on this issue. The court pointed out that there is a presumption of qualified immunity, and Martin had to prove that: 1) the speech touched on a matter of public concern; and 2) "the value of the speech outweighs its potential for disruption of government workplace efficiency."

The court made clear that a defendant in a First Amendment suit would "rarely be on notice that his actions are unlawful." No authority suggests that a person in Baugh's position would obviously have known that Martin's speech was constitutionally protected. It is almost impossible for a reasonable person to judge before trial how a court will assess the array of factors that go into whether speech is protected. In sum, it was not plainly manifest when Baugh disciplined Martin that his First Amendment rights were being violated. Baugh is entitled to qualified immunity.

In Badia v. City of Miami, Badia worked for the City of Miami Department of Public Works. Among other claims, Badia alleged that the City and Wally Lee, the former director of the department, violated her First Amendment rights by retaliating against her after she filed a charge of

621. Martin, 141 F.3d at 1419.
622. Id.
623. Id.
624. Id.
625. Id. at 1420.
626. Martin, 141 F.3d at 1418.
627. Id. at 1420.
628. Id.
629. Id. (citing Goffer v. Marbury, 956 F.2d 1045, 1049 (11th Cir. 1992)).
630. Id.
631. Martin, 141 F.3d at 1420–21.
632. Id. at 1420.
633. Id. at 1421.
634. Id.
635. 133 F.3d 1443 (11th Cir. 1998).
636. Id. at 1445.
discrimination. Lee claimed qualified immunity, but the district court rejected Lee's claim, ruling that a genuine issue existed over whether discrimination motivated Lee's treatment of Badia and the elimination of her job. Lee appealed.

Badia's First Amendment claim came down to whether the "speech" was a matter of public concern. Precedent dictates that the court focus on the "content, form, and context." In the words of the court, "if it is unclear whether Badia's complaints were of the kind held to involve a matter of public concern, then Lee's alleged actions did not violate clearly established First Amendment rights and he is entitled to qualified immunity." Badia cites precedent that treats an employee's federal court testimony in a discrimination suit as speech on a matter of public concern. The court pointed to a split of authority over whether a formal employment discrimination complaint rises to the level of speech on a matter of public concern. In light of this lack of consensus on the issue, the right deemed violated here could not have been clearly established for purposes of qualified immunity. In short, Lee's alleged actions did not violate clearly established First Amendment rights, so he is entitled to qualified immunity.

In Morris v. Crow, the issue also turned on whether a public employee's speech touched on a matter of public concern. Deputy Sheriff Morris was dismissed after an investigation into two incidents of misconduct. Morris claimed that he was terminated due to statements he made in an accident report, and in his deposition testimony involving the investigation of a codeputy's traffic accident, in which a citizen was killed. Morris's accident report mentioned that the officer was driving over 130 miles per hour in a 50 miles per hour zone and that the officer

637. Id.
638. Id.
639. Id.
640. Badia, 133 F.3d at 1445.
641. Id. (citing Connick v. Myers, 461 U.S. 138, 147 (1983)).
642. Id.
643. Id. at 1446.
644. Id.
645. Badia, 133 F.3d at 1446.
646. Id.
647. 142 F.3d 1379 (11th Cir. 1998).
648. Id. at 1381.
649. Id.
650. Id.
failed to switch on "an emergency blue warning light in violation of sheriff's office policy."\textsuperscript{651}

On appeal, the issue was whether Morris's speech can be "fairly characterized as constituting speech on a matter of public concern."\textsuperscript{652} The Eleventh Circuit noted that the Supreme Court has yet to decide whether "speech that occurs in the course of and as part of an employee's ordinary duties is protected."\textsuperscript{653} Relying on Eleventh Circuit precedent, the court focused on "whether the speech at issue was made primarily in the employee's role as citizen, or primarily in the role of employee."\textsuperscript{654} Forced to choose, the court concluded that Morris's report stemmed primarily from his role as employee: "[t]here is nothing in the record to indicate that Morris's purpose in writing the accident report was to bring to light any wrongdoing or to do any more than accurately report an accident in the course of his employment."\textsuperscript{655} As for his deposition testimony, Morris was subpoenaed to testify about the accident: "[t]he mere fact that Morris's statements were made in the context of a civil deposition cannot transform them into constitutionally protected speech."\textsuperscript{656} For this reason, the Eleventh Circuit affirmed the district court's ruling that Morris's statements were not protected speech under the First Amendment.\textsuperscript{657}

\textit{Gonzalez v. Lee County Housing Authority}\textsuperscript{658} dealt with the same issue: Whether public employee speech touched on a matter of public concern.\textsuperscript{659} Specifically, whether a letter from an employee of a county housing authority to her supervisor, claiming that she was forced to engage in discriminatory housing practices, constituted speech on a matter of public concern.\textsuperscript{660} The Eleventh Circuit ruled that it did not; therefore, the supervisor was entitled to qualified immunity.\textsuperscript{661}

\begin{thebibliography}{99}

\bibitem 651. Id.
\bibitem 652. \textit{Morris}, 142 F.3d at 1381 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).
\bibitem 653. Id.
\bibitem 654. Id. at 1382 (quoting Morgan v. Ford, 6 F.3d 750, 755 (11th Cir. 1993)) (internal citations omitted).
\bibitem 655. Id.
\bibitem 656. Id. at 1383.
\bibitem 657. \textit{Morris}, 142 F.3d at 1383.
\bibitem 658. 161 F.3d 1290 (11th Cir. 1998).
\bibitem 659. Id. at 1292.
\bibitem 660. Id. at 1293.
\bibitem 661. Id. at 1298.
\end{thebibliography}
2. Freedom of Association

In *Blanco v. City of Clearwater*, Blanco was a police officer with the Clearwater Police Department. Blanco was discharged after an investigation into whether he was involved in a long-term sexual relationship with a seventeen-year-old girl. Blanco was found to be in violation of a department regulation which provides:

[N]o employee shall engage in conduct on or off-duty which adversely affects the morale or efficiency of the department; nor shall any employee engage in conduct on or off-duty which has a tendency to destroy public respect for the employee and/or the department and/or destroy confidence in the operation of the municipal service.

In court, Blanco invoked his constitutional right to intimate association, among other rights. Again, whether some of the defendants were entitled to qualified immunity turned on whether the law was clearly established that an adult has a constitutional right to engage in a sexual relationship with a minor. At most, one earlier case ruled that "dating is a type of association that must be protected by the First Amendment's freedom of association." But, one case does not make for a clearly established law; therefore, the defendants were entitled to qualified immunity.

The *Miami Herald* recently reported on a case that holds out the potential for implicating public employees' freedom of association. In January, 1999 thirty-one people were arrested in a police operation sting at a private club where members took part in consensual sexual activities in front of each other. Among the thirty-one arrested were two public high school teachers who were suspended without pay by the Broward School Board on August 3, 1999, pursuant to a state administrative rule that enables school districts to discharge public employees "convicted of a crime involving

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662. 9 F. Supp. 2d 1316 (M.D. Fla. 1998).
663. Id. at 1318.
664. Id.
665. Id. (quoting CLEARWATER, FLA., POLICE DEP’T reg. 213.15).
666. Id.
668. Id. (quoting Wilson v. Taylor, 733 F.2d 1539, 1543 (11th Cir. 1984)).
669. Id.
671. Id.
moral turpitude." The article pointed out that the case raises "questions about whether the private lives of teachers should have any bearing on their public roles in the classroom." While some board members felt that the teachers' dismissal amounted to an invasion of their privacy, another claimed that it was permissible to "hold teachers to a high moral standard." In the face of public opinion critical of the board's discipline, the board is weighing whether to take another vote. News accounts cite two earlier cases that frame the strict moral guidelines for teachers. In 1981 the Eleventh Circuit affirmed the revocation of teaching licenses of two Lee County teachers for growing marijuana in their gardens. Similarly, in 1975 the Eleventh Circuit sustained the termination of a Miami-Dade teacher who was sexually abusing his stepdaughter.

XII. UNEMPLOYMENT COMPENSATION

One unemployment compensation case involving a public employee bears mention. In Philemy v. Florida Department of Health & Rehabilitative Services, Philemy worked for HRS as a behavioral program associate. In the course of her duties, Philemy discovered bruises on the back of a resident. The bruises looked like the imprint of a key. Although she wrote down her observations, Philemy failed to report the abuse to the abuse registry in accordance with HRS policy. After she was fired, Philemy appealed her termination to PERC, which sustained the dismissal.

Later, Philemy applied for unemployment compensation. At first, her claim was approved since the claims examiner deemed that her termination "was for reasons other than misconduct connected with work." HRS

672. Id.
673. Id.
674. Id.
675. Daniel de Vise & Connie Piloto, Teacher Discipline Sparks Big Outcry Board to Reconsider Sex-Raid Suspensions, MIAMI HERALD (Broward), Aug. 5, 1999, at 1A.
676. Beth Reinhard, Suspension of Two Teachers Prompts Debate, MIAMI HERALD, Aug. 8, 1999, at 1B.
677. Id.
678. Id.
679. 731 So. 2d 64 (Fla. 3d Dist. Ct. App. 1999).
680. Id. at 65.
681. Id.
682. Id.
683. Id.
684. Philemy, 731 So. 2d at 65.
685. Id. at 66.
686. Id.
appealed and the appeals referee concluded that Philemy was terminated for misconduct relating to her job. 687

On appeal, the Third District Court of Appeal reversed and reinstated Philemy’s unemployment compensation benefits. 688 Under Florida law, “misconduct” that will disqualify a claimant is defined as:

(a) Conduct evincing such willful or wanton disregard of an employer’s interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his or her employee; or

(b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to his or her employer. 689

All doubts must be resolved in favor of the claimant and the employer bears the burden of proving misconduct. 690 A cause sufficient for job termination is not invariably misconduct that will bar unemployment compensation benefits. 691 Here, Philemy notified a coworker, recorded her findings in a log, and posted a note on the bulletin board recording her concerns. 692 Even though she was negligent in failing to call the abuse registry and to notify her supervisor, her negligence did not amount to misconduct for purposes of unemployment compensation eligibility. 693

XIII. PUBLIC SECTOR COLLECTIVE BARGAINING, UNFAIR LABOR PRACTICES, AND UNION ELECTIONS

On May 20, 1999 the Supreme Court of Florida handed down a landmark decision embracing the fundamental right of government attorneys to bargain collectively over the terms and conditions of their employment. 694 Back in 1993, the State Employees Attorneys’ Guild (“SEAG”) filed a

687. Id.
688. Id.
690. Philemy, 731 So. 2d at 66 (citing McKnight v. Florida Unemployment Appeals Comm’n, 713 So. 2d 1080, 1081 (Fla. 1st Dist. Ct. App. 1998)).
691. Id. at 66 (citing Betancourt v. Sun Bank Miami, N.A., 672 So. 2d 37, 38 (Fla. 3d Dist. Ct. App. 1996)).
692. Id.
693. Id.
694. Chiles v. State Employees Attorneys Guild, 734 So. 2d 1030, 1033 (Fla. 1999) [hereinafter “Chiles II”].
petition with PERC, seeking certification as a bargaining unit of attorneys who work for the State of Florida. 695 PERC scheduled an evidentiary hearing. 696 In response, the State asked the Supreme Court of Florida to stop PERC from hearing SEAG’s petition, arguing that only the state supreme court could regulate the practice of law. 697 The court refused to issue a writ of prohibition because PERC is not a “court.” 698 Two months later, Governor Chiles signed into law a bill aimed at barring attorneys working for the state from bargaining collectively. 699 In light of the new law, PERC dismissed SEAG’s petition. 700 The lawyers’ union appealed PERC’s dismissal, calling into question the constitutionality of the new law. 701 The district court sustained PERC’s dismissal. 702 SEAG brought suit in circuit court challenging the law’s constitutionality under article I, section 6 of the Florida Constitution. 703 The circuit court struck down the law, ruling that it encroached upon the right of government lawyers to bargain collectively. 704 The First District Court of Appeal affirmed. 705 On appeal, the Supreme Court of Florida agreed that the new law was unconstitutional. 706 The court relied on article I, section 6 of the Florida Constitution, which is aimed at protecting the right of public employees to bargain collectively, as evidence that the people of Florida had foreclosed this debate. 707 In reaching this result, the court applied strict scrutiny analysis under which the state must come forward with a compelling state interest for denying government lawyers the right to bargain collectively. 708 Moreover, the law must achieve that “compelling state interest in the least intrusive means possible.” 709 The State argued that “government attorneys

695. Id. at 1031.
696. Id.
697. Id.
698. Id. (citing Chiles v. Public Employees Relations Comm’n, 630 So. 2d 1093, 1094 (Fla. 1994)).
700. Chiles II, 734 So. 2d at 1032 (citing 20 F.P.E.R. ¶ 25151 (1994)).
701. Id.
702. Id. (citing State Employees Attorneys Guild v. State, 653 So. 2d 487, 489 (Fla. 1st Dist. Ct. App. 1995)).
703. Id.
704. Id.
706. Chiles II, 734 So. 2d at 1036.
707. Id.
708. Id.
709. Id. at 1033 (quoting State Employees Attorneys Guild v. State, 653 So. 2d 487, 488 (Fla. 1st Dist. Ct. App. 1995)).
must give complete confidentiality, fidelity and loyalty to the State and local
government while conducting its legal affairs.”\textsuperscript{710} In sum, according to the
State the personal nature of the attorney-client relationship would be under-
mined if the attorney were entitled to continuously sue the state to enforce
the terms of a collective bargaining agreement.\textsuperscript{711} However, the court found
that the State introduced no evidence that the law was needed to protect the
asserted state interest.\textsuperscript{712} No evidence supported the State’s conclusion that
“government employed attorneys would abandon their ethical obligation of
confidentiality, fidelity and loyalty” by joining a labor union.\textsuperscript{713} Moreover,
the experience of other states in which government lawyers are entitled to
bargain collectively has produced no “apparent harm to the attorney-client
relationship.”\textsuperscript{714} Attorneys who work for the federal government also are
entitled to bargain collectively with no apparent ill effect.\textsuperscript{715}

The State also claimed that collective bargaining would entail
compartmentalizing its legal staff to minimize the risk of conflict.\textsuperscript{716} The
court’s response was that such an administrative burden did not rise to the
level of a compelling state interest.\textsuperscript{717} Moreover, the court ruled that
collective bargaining by state-employed lawyers did not infringe upon the
court’s jurisdiction over lawyer discipline.\textsuperscript{718} If other states are any guide,
collective bargaining can be framed to accommodate both the government’s
interests in assuring loyalty and competence in their attorneys, and the
attorneys’ constitutional right as public employees to bargain collectively.\textsuperscript{719}
In support of this conclusion, the court cited the position of the American
Bar Association and of The Florida Bar Board of Governors, which
recognizes that attorney collective bargaining is not inherently incompatible
with the attorney-client relationship.\textsuperscript{720} At the same time, the court warned
that the rules regulating The Florida Bar and a lawyer’s duty of loyalty take
precedence over a lawyer’s collective bargaining activities, and any breaches
will lead to discipline by the court under article V, section 15 of the Florida
Constitution.\textsuperscript{721}

\textsuperscript{710.} \textit{Id.} \\
\textsuperscript{711.} \textit{Chiles II,} 734 So. 2d at 1034. \\
\textsuperscript{712.} \textit{Id.} at 1034. \\
\textsuperscript{713.} \textit{Id.} \\
\textsuperscript{714.} \textit{Id.} \\
\textsuperscript{715.} \textit{See id.} at 1034–35. \\
\textsuperscript{716.} \textit{Chiles II,} 734 So. 2d at 1035. \\
\textsuperscript{717.} \textit{Id.} \\
\textsuperscript{718.} \textit{Id.} \\
\textsuperscript{719.} \textit{Id.} at 1036. \\
\textsuperscript{720.} \textit{Id.} (citing \textsc{Model Code of Professional Responsibility EC 5-13 (1980)).} \\
\textsuperscript{721.} \textit{Chiles II,} 734 So. 2d at 1037.
An article in the *Miami Herald* reported that a public school teachers' union filed a grievance over class sizes, and teachers at Western High School followed the lead.\(^{722}\) The action was noteworthy since it was the first time that the teachers' union filed a grievance over class size.\(^{723}\) School district rules stipulate that, on average, teachers should handle no more than 198 students a day.\(^{724}\) For schools with block scheduling, classes that run twice as long, the number is ninety-nine students.\(^{725}\) With an enrollment of 3675, Western High School was running at double its capacity.\(^{726}\) Although the school added portable classrooms, the union claimed that the school violated health and safety standards by crowding too many students into each portable classroom.\(^{727}\) The issue of overcrowding came to a head at Walter C. Young Middle School, but was settled when teachers agreed on extra pay to teach additional classes.\(^{728}\) As the School Board saw it, however, the issue was not grievable since the collective bargaining agreement was silent on the question of class size, unlike most contracts between school boards and teachers' unions.\(^{729}\)

In *City of Safety Harbor v. Communications Workers of America*,\(^{730}\) PERC had certified the Communications Workers of America ("CWA") as the exclusive bargaining representative for a bargaining unit.\(^{731}\) According to PERC, the bargaining unit, composed wholly of nonprofessional employees, included the classification "Recreation Leaders II," even though the parties regarded that classification as professional.\(^{732}\) On appeal, PERC's ruling was reversed and the court ordered a new election.\(^{733}\) At issue was the proper interpretation of the statute defining the term "professional employee."\(^{734}\) The introductory clause of the statute recites that a professional employee must be engaged in work "in any two or more" of the following four enumerated categories.\(^{735}\) PERC read the fourth

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723. *Id.*

724. *Id.*

725. *Id.*

726. *Id.*

727. De Vise, *supra* note 722, at 1A.

728. *Id.*

729. *Id.*


731. *Id.* at 266.

732. *Id.* (citing Communications Workers of Am. v. City of Safety Harbor, 22 F.P.E.R. ¶ 27125 (1996)).

733. *Id.*

734. *Id.* (citing FLA. STAT. § 447.203(13) (1995)).

735. FLA. STAT. § 447.203(13)(a) (1999). The four categories stated in the statute are:
category of the definition, the “specialized intellectual instruction” category, as a threshold requirement.\textsuperscript{736} The court ruled that PERC’s treatment of section 447.203(13)(a)4 of the Florida Statutes as a threshold was error.\textsuperscript{737} PERC’s reliance on the analogous federal statute, the NLRA,\textsuperscript{738} and the analogous statutes of other states was ill advised.\textsuperscript{739} Unlike those statutes, employees in Florida qualify as “professional” based on meeting “any two or more” of the four listed criteria.\textsuperscript{740} The other statutes omit this modifying language.\textsuperscript{741} Since Safety Harbor’s Recreation Leaders II met the first two criteria of section 447.203(13)(a), they qualified as “professional employees.”\textsuperscript{742}

Once PERC certifies a union as the exclusive bargaining representative of a defined bargaining unit, the public employer and the union must bargain in good faith over the terms and conditions of employment.\textsuperscript{743} In Hillsborough Area Regional Transit Authority v. Amalgamated Transit Union Local 1593,\textsuperscript{744} the Regional Transit Authority and the Transit Union filed unfair labor practice charges with PERC.\textsuperscript{745} After a hearing, PERC ruled that the Transit Union had not bargained in bad faith.\textsuperscript{746} The Transit

1. Work predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work;
2. Work involving the consistent exercise of discretion and judgment in its performance;
3. Work of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
4. Work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education, an apprenticeship, or training in the performance of routine mental or physical processes.

\textit{Id.} \textsuperscript{736}. City of Safety Harbor, 715 So. 2d at 267.
\textsuperscript{737}. Id.
\textsuperscript{738}. 29 U.S.C. § 152(12) (1994) provides that a professional must be engaged in work calling for knowledge of an advanced type ordinarily secured via higher education.
\textsuperscript{739}. City of Safety Harbor, 715 So. 2d at 267.
\textsuperscript{740}. Id. at 267 (citing FLA. STAT. § 447.203(13)(a)).
\textsuperscript{741}. Id. at 267–68.
\textsuperscript{742}. Id. at 268.
\textsuperscript{743}. \textit{See} Hillsborough Area Reg’l Transit Auth. v. Amalgamated Transit Union Local 1593, 720 So. 2d 1160 (Fla. 1st Dist. Ct. App. 1998).
\textsuperscript{744}. 720 So. 2d 1160 (Fla. 1st Dist. Ct. App. 1998).
\textsuperscript{745}. Id. at 1161.
\textsuperscript{746}. Id.
Authority appealed. The court sustained PERC's judgment that the Transit Union had not bargained in bad faith. "[W]hether a party bargains in good or bad faith is a factual determination based on the circumstances of the particular case." Even in the face of evidence that may support a contrary view, the court felt compelled to accept PERC's conclusion.

XIV. EMPLOYMENT DISCRIMINATION

A. Section 1981

Section 1981 of title 42 of the United States Code, enacted to police the Thirteenth Amendment, supports only claims alleging racial discrimination. In Jett v. Dallas Independent School District, the Supreme Court ruled that § 1981 would not support a suit against a state employer. In 1991, however, Congress amended section 1981 by adding subsection (c), making clear that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination." A split has emerged among the circuit courts over whether section 1981(c) statutorily overrules Jett and opens up an implied private right of action against municipalities.

In Cason Enterprises, Inc. v. Metropolitan Dade County, Cason Enterprises, Inc. ("CEI") entered into a contract with the Miami-Dade Water and Sewer Department for the purchase of bulk granular potassium permanganate ("GPP") with an option by the County to purchase potassium permanganate ("PP") in liquid form. Later, the County purchased drums of dry PP from another supplier, claiming that CEI refused to sell PP in drums. In 1995 the County ordered GPP in bulk. CEI was unable to

747. Id.
748. Id.
749. Hillsborough, 720 So. 2d at 1161 (quoting Duval County Sch. Bd. v. Florida Pub. Employees Relations Comm'n, 353 So. 2d 1244, 1248 (Fla. 1st Dist. Ct. App. 1978)).
750. Id.
753. Id. at 738.
757. Id. at 1335.
758. Id.
759. Id. at 1336.
supply the ordered bulk product. CEI was found to be in default and the contract was canceled in 1996. CEI sued the County for alleged violations of section 1981 of title 42 of the United States, among other claims. The court ruled that "[p]roof of intentional discrimination is required in order to establish liability under § 1981." Moreover, "[l]iability under § 1981 is personal in nature and cannot be imposed vicariously."

B. Title VII and Equal Protection via § 1983

1. Definition of Public Employer under Title VII

The Eleventh Circuit, in *Lyes v. Riviera Beach*, established a new test to determine whether a public employer has the requisite number of employees to fall within Title VII's coverage. The court focused on "the presumption that governmental subdivisions denominated as separate and distinct under state law should not be aggregated for purposes of Title VII." This presumption, however, is rebuttable "where one entity exerts or shares control over the fundamental aspects of the employment relationships of another entity, to such a substantial extent that it clearly outweighs the presumption that the entities are distinct." Evidence of such control includes: 1) interrelation of operations; 2) centralized control of labor operations; 3) authority to hire, transfer, promote, discipline, or discharge; and 4) the obligation to pay or the duty to train the plaintiff.

2. National Origin Discrimination

National origin discrimination in the public sector can be challenged under the Equal Protection Clause of the Fourteenth Amendment and under Title VII of the Civil Rights Act of 1964. In *Buzzi v. Gomez*, the plaintiffs were former and current officers of the Metro-Dade Police

760. *Id.*
762. *Id.* at 1337.
763. *Id.*
764. *Id.*
765. 166 F.3d 1332 (11th Cir. 1999) (en banc).
766. *Id.* at 1345.
767. *Id.*
768. *Id.*
769. *Id.*
Department ("MDPD"). The plaintiffs claimed that their former supervisor, Lieutenant Gomez, a Cuban-American male, hatched a scheme to systematically transfer them from, or sometimes, bar their transfer into, assignments at the Airport District because they were not Cuban, while employing less qualified Cuban transferees. Gomez was also accused of harassing non-Cuban officers from the Airport District to force their transfers to other districts. The Airport District is a coveted assignment, posing low risk and much overtime. Plaintiffs claimed that they were victims of national origin discrimination by virtue of their non-Cuban heritage, in violation of the Equal Protection Clause of the Fourteenth Amendment. Defendant Carlos Alvarez was also sued because, as the Assistant Director of the MDPD, he did not remedy the situation.

Eventually, Division Chief Paull met with Buzzi, who related evidence of a hostile environment on grounds of national origin. The Professional Compliance Bureau ("PCB") conducted an investigation, which led to Alvarez removing Gomez from his post. PCB’s report sustained several of the allegations, concluding that Gomez had acted unprofessionally and that he failed at times to follow standard procedures for transfers. PCB’s report stopped short of accusing Gomez of national origin discrimination. PCB did not investigate Alvarez. Dissatisfied with PCB’s report, the plaintiffs filed charges of discrimination with the EEOC, which led to a § 1983 suit being filed in federal court, naming Gomez and Alvarez, among other defendants.

The court framed the issue as whether Alvarez was entitled to qualified immunity from plaintiffs’ § 1983 suit. Violations of § 1983 occur when a person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."
Proof of a violation requires a showing of intent.\textsuperscript{786} "A defendant may be liable only for an affirmative act or ‘deliberate indifference’ to a risk where the deprivation of a federal right is a ‘plainly obvious consequence’ of the defendant’s inaction."\textsuperscript{787} The court concluded that Alvarez was entitled to qualified immunity as a matter of law.\textsuperscript{788}

The Supreme Court framed the test for judging whether a public official is entitled to qualified immunity.\textsuperscript{789} "[G]overnment officials . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."\textsuperscript{790} A government official performing discretionary functions is shielded if "a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred."\textsuperscript{791} Entitlement to immunity is the rule, not the exception.\textsuperscript{792} The Eleventh Circuit’s formulation of the test is two-fold.\textsuperscript{793} "First, the defendant must prove that he was acting within the scope of his discretionary authority" when the misconduct occurred.\textsuperscript{794} If the defendant satisfies this prong, then the plaintiff must prove that the defendant “violated clearly established law based upon objective standards,” in other words, that the plaintiff’s rights were so clear that a reasonable government official would have understood that his acts violated the plaintiff’s rights.\textsuperscript{795}

Applying this test, the court concluded that Alvarez acted in his discretionary authority so the burden shifted to the plaintiffs, who failed to meet their burden of demonstrating that Alvarez “violated clearly established constitutional law.”\textsuperscript{796} In short, the plaintiffs failed to show that when Alvarez failed to act, the “law was developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in Alvarez’s place, that what he was doing violated federal law.”\textsuperscript{797}

\textsuperscript{786} Buzzi, 24 F. Supp. 2d at 1359.
\textsuperscript{787} Id. (quoting Board of County Comm’rs v. Brown, 520 U.S. 397, 398 (1997)).
\textsuperscript{788} Id. at 1359.
\textsuperscript{789} Id.
\textsuperscript{790} Id. at 1359–60 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
\textsuperscript{791} Buzzi, 24 F. Supp. 2d at 1360 (quoting Hardin v. Hayes, 957 F.2d 845, 848 (11th Cir. 1992)).
\textsuperscript{792} Id.
\textsuperscript{793} Id.
\textsuperscript{794} Id. (citing Hartsfield v. Lemacks, 50 F.3d 950, 953 (11th Cir. 1995)).
\textsuperscript{795} Id. (citing Swint v. City of Wadley, 51 F.3d 988, 995 (11th Cir. 1995)).
\textsuperscript{796} Buzzi, 24 F. Supp. 2d at 1360 (quoting Sammons v. Taylor, 967 F.2d 1533, 1539 (11th Cir. 1992)).
\textsuperscript{797} Id. (citing Braddy v. Florida Dep’t of Labor & Employment Sec., 133 F.3d 797, 801 (11th Cir. 1998)).
The evidence demonstrated that once Alvarez received concrete information of a hostile environment at the Airport District, he immediately authorized an investigation.\textsuperscript{798} When the fruits of the investigation pointed out misconduct, he "summarily relieved Gomez of his command."\textsuperscript{799} Without some case precedent holding that an official, akin to Alvarez, had a duty to halt the transfers of personnel, Alvarez enjoyed discretion to decide whether plaintiffs' grievances required his immediate attention.\textsuperscript{800} For Alvarez to lose his immunity, it would have to be demonstrated that his "'acts or omissions were the cause—not merely a contributing factor—of the constitutionally infirm condition.'"\textsuperscript{801}

3. Relationship Between Title VII and § 1983 Claims

In \textit{Johnson v. City of Fort Lauderdale},\textsuperscript{802} Johnson, an African-American male, worked for the City of Fort Lauderdale Fire Department.\textsuperscript{803} In 1994, Johnson sued the City, a former Fire Chief, and four supervisors under Title VII, and §§ 1981 and 1983, alleging an equal protection violation, and claiming racial harassment, discrimination, and retaliation.\textsuperscript{804} In response, the defendants argued that the Civil Rights Act of 1991\textsuperscript{805} left Title VII as the sole remedy for public sector employment discrimination.\textsuperscript{806}

The Eleventh Circuit surveyed the views of other courts on whether the 1991 Act left Title VII and § 1983 as the exclusive remedies for public sector employment discrimination.\textsuperscript{807} The Fourth Circuit and several district courts have rejected defendants' argument that such exclusivity is implied from 1) "the Act's inclusion of a savings clause related to § 1981" and conscious exclusion of an analogous savings clause for § 1983; and 2) the Act's overall remedial scheme.\textsuperscript{808} Turning to the Act's legislative history, the court pointed out that while the language is ambiguous at best, the fairest

\begin{itemize}
  \item \textsuperscript{798} \textit{Id.} at 1361.
  \item \textsuperscript{799} \textit{Id.}
  \item \textsuperscript{800} \textit{Id.}
  \item \textsuperscript{801} \textit{Buzzi}, 24 F. Supp. 2d at 1362 (quoting LaMarca v. Turner, 995 F.2d 1526, 1538 (11th Cir. 1993)).
  \item \textsuperscript{802} 148 F.3d 1228 (11th Cir. 1998).
  \item \textsuperscript{803} \textit{Id.} at 1229.
  \item \textsuperscript{804} \textit{Id.}
  \item \textsuperscript{806} \textit{Johnson}, 148 F.2d at 1229.
  \item \textsuperscript{807} \textit{Id.}
  \item \textsuperscript{808} \textit{Id.} (citing Beardsley v. Webb, 30 F.3d 524, 527 (4th Cir. 1994); Stoner v. Department of Agric., 846 F. Supp. 738, 740–41 (W.D. Wis. 1994)).
\end{itemize}
conclusion is that Congress did not intend to limit § 1983's scope. In short, the omission "sheds little light" on Congress's aim to preserve or preempt § 1983 remedies for municipal workers. In support of its ruling the court noted that the legislative history of Title VII evinces congressional intent to preserve, not to preempt, "§ 1983 as a parallel remedy for unconstitutional public sector employment discrimination." In light of this conclusion, the court affirmed the district court's order denying the defendants' motion to dismiss Johnson's § 1983 claims.

4. Relationship Between Title VII and Collective Bargaining

In United States v. City of Hialeah, the federal government accused the City of Hialeah of discrimination against African-Americans in hiring firefighters and police officers in violation of Title VII. The parties entered into a consent decree including a provision granting retroactive competitive seniority to thirty new African-American workers. The district court refused to approve this part of the consent decree because it would violate contractual seniority rights of the incumbent employees, rights enshrined in the parties' collective bargaining agreements. This case can be framed as an effort to adopt affirmative action via a consent decree that is blocked by claims of reverse discrimination.

On appeal, the Eleventh Circuit concluded that affirmative remedial goals cannot be achieved in a consent decree proceeding if rights of a nonconsenting third party are affected. Before such affirmative action can be adopted, there must be a trial on the merits or a valid summary judgment. A prima facie case of discrimination alone will not warrant depriving an objecting party's right to a full adjudication of its arguments on the merits in a trial. One party to a collective bargaining agreement cannot rely on a nonconsensual Title VII consent decree to relieve itself of its

809. Id. at 1230.
810. Id. (quoting Stoner v. Department of Agric., 846 F. Supp. 738, 741 (W.D. Wis. 1994)).
811. Johnson, 148 F.3d at 1230.
812. Id. at 1231.
813. 140 F.3d 968 (11th Cir. 1998).
814. Id. at 971.
815. Id.
816. Id.
817. Id.
818. City of Hialeah, 140 F.3d at 975.
819. Id. at 977.
820. Id. at 978.
obligations, which the other party negotiated and bargained to secure. At the same time, the court made clear that if a Title VII violation is found after trial, collectively bargained seniority rights may have to be modified as part of the remedy.

5. Affirmative Action

Court ordered affirmative action in the form of a consent decree was the subject of an article in the *Miami Herald*. Twenty-two years ago, the City of Miami was ordered by a federal court to improve its record in hiring and promoting minorities in its work force. In response, the city rewrote its hiring and promotion exams to eliminate racial bias. In addition, the City adopted rules that accorded lower ranked minorities opportunities to fill vacancies that would otherwise go to non-Hispanic whites.

In 1999, the United States Justice Department urged a federal judge to end the court order in light of the fact that today, roughly half of Miami's employees are Hispanic and thirty percent are African-American. As for the police department, the court would continue to oversee exams for the ranks of captain and below for about a year. Departments other than police and fire departments have dropped exams for hiring and promotions altogether, relying on more flexible hiring practices.

Ward Connerly, who spearheaded the campaign to end affirmative action in government hiring in California, has turned his attention to Florida. According to a *New York Times* article, Connerly hopes to amend the Florida Constitution to bar affirmative action that is based on race, sex, or ethnicity, in government hiring and contracts. The article cited a poll showing that eighty-four percent of over 600 voters reached by telephone would vote for a ban on affirmative action. To get his initiative on the
Next,...

Governor Jeb Bush, a critic of the measure, dismissed Connerly’s crusade as divisive. According to the *Miami Herald*, however, retirees from Homestead and Margate have added their support to building contractors who favor the measure.

Meanwhile, according to an editorial in the *Miami Herald*, the Miami-Dade County Commission voted in February, 1999 to reaffirm a minority set-aside program for professional contracts. Citing Supreme Court precedent eroding the legal grounds for minority set-asides, the editorial warned that “20-year-old set-aside programs must be adapted to today’s realities.”

An article in the *Miami Herald* also reported that eleven African-American city employees sued the City of Fort Lauderdale, alleging that they were denied promotions on account of their race. The lawsuit claims that the City promoted three white males in the Public Works Department over senior African-American workers.

6. Sex Discrimination and Sexual Harassment

In May 1999, five female law professors resigned from Florida State University’s law school, alleging sexual harassment. According to the *Miami Herald*, one of the professors claimed that “harassment is tolerated on several levels at the school” although the women did not single out any particular person.

An editorial in the *Miami Herald* reviewed claims of sexual harassment among Pembroke Pines city employees. The editorial criticized the city for allowing accused harassers to retire. It also urged cities to create “clear channels for reporting harassment, quick investigations and discipline.

833. *Id.*
834. *Id.*
835. Bragg, supra note 830, at A16.
838. *Id.*
839. Brad Bennett, *Workers Accuse Fort Lauderdale of Racial Bias*, *MIAMI HERALD* (Broward), July 15, 1999, at 1B.
840. *Id.*
841. *FSU Professors Cite Harassment*, *MIAMI HERALD*, May 8, 1999, at 5B.
842. *Id.*
844. *Id.*

https://nsuworks.nova.edu/nlr/vol24/iss1/4
of offenders,” otherwise, they would have to continue paying out public funds to settle harassment suits. 845  

While not a public employment case, the Blockbuster hair length case arose in South Florida and only ended when the Supreme Court refused to review the case. 846 Four men claimed that Blockbuster singled them out because of their hair length. 847 Left intact was the Eleventh Circuit’s ruling that different hair length rules for men and women do not violate Title VII. 848 Blockbuster’s policy required male employees to wear their hair within two inches of their collar, while women’s hair length went unregulated. 849 In the past, the Supreme Court has sustained grooming standards for police officers who were not permitted to wear facial hair or wear their hair long. 850 

In Department of Business & Professional Regulation v. Balaguer, 851 Ray Balaguer and a woman were finalists for a promotion to the rank of sergeant in the Department’s Division of Alcoholic Beverages and Tobacco. 852 After Balaguer was passed over for the promotion, he filed a petition with the Commission on Human Relations, claiming gender and age discrimination. 853 After an administrative hearing, the law judge (“ALJ”) found that the Department had committed unlawful gender discrimination and the Commission adopted this judgment as its own, ordering the Department to stop discriminating and to promote Balaguer to sergeant. 854 On appeal, the court made clear that it would not disturb the ALJ’s findings unless they were clearly erroneous. 855 After reviewing the record, the court concluded that there was no evidentiary support for the ALJ’s critical findings of fact. 856 

In Hazel v. School Board of Dade County, 857 Hazel served as Student Activities Director for Northwestern High School. 858 Clarke became Principal in 1995. 859 Hazel claimed that Clarke sexually harassed her by

845. Id.
847. Harper, 139 F.3d at 1386.
848. Id. at 1387.
852. Id. at 537.
853. Id.
854. Id.
855. Id.
856. Balaguer, 729 So. 2d at 538.
858. Id. at 1351.
859. Id.
making comments about her physical appearance, staring at her in a sexual manner, and propositioning her for sex. Hazel also claimed that Clarke threatened that she would regret not having sex with him. After putting him off multiple times, Hazel alleged that Clarke retaliated against her by eliminating her job and reassigning her other duties to other teachers without informing Hazel. Later, Hazel shared her concerns with a former principal of the school, Koonce. As a School Board administrator, Koonce spoke with Clarke about Hazel’s allegations. Clarke was also accused by other female employees of sexual harassment. The School Board never talked to Hazel about her grievance or disciplined Clarke. Hazel claimed that Clarke stepped up his harassment after he learned that she had complained. In 1996, Clarke demoted Hazel (involuntarily transferred her to a classroom teaching position) even though she had received the highest possible performance rating the year before.

Later, the Equal Employment Opportunity Commission allowed Hazel to bring suit against the School Board and Clarke, in his individual capacity. The district court focused on the prima facie case for “quid pro quo sexual harassment,” in which a plaintiff must show that:

1. the employee belongs to a protected class;
2. the employee was subject to unwelcome sexual harassment;
3. the harassment complained of was based on sex;
4. the employee’s reaction to the harassment complained of affected tangible aspects of the employee’s compensation, terms, conditions, or privileges of employment; and
5. respondeat superior.

The court noted that quid pro quo sexual harassment can be explicit or implicit. The closer the connection “between a discussion about job benefits and a request for sexual favors, the more likely that there has been

860. Id.
861. Id.
862. Hazel, 7 F. Supp. 2d at 1351.
863. Id.
864. Id.
865. Id. at 1352.
866. Id.
867. Hazel, 7 F. Supp. 2d at 1352.
868. Id.
869. Id.
870. Id. at 1353 (citing Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982)).
871. Id.
an 'implicit' conditioning by the harasser." 872 Also relevant is how often the advances were made, the length of time over which the advances took place, and the strength of the connection between the advances and the discussion of job benefits or detriments. 873 After weighing all of these factors, the court concluded that Hazel made out a prima facie case of quid pro quo sexual harassment under Title VII. 874 On Hazel's Title IX claim, however, the court ruled that Title VII is the exclusive remedy for employment discrimination claims on grounds of sex in federally funded educational institutions. 875 Finally, the court held that Hazel had failed to state a § 1983 claim against the School Board or the principal. 876

7. Religious Discrimination

Religious discrimination in the workplace may be contested under the Religious Freedom Restoration Act ("RFRA"), 877 under Title VII, and under both prongs of the First Amendment, as free speech and as free exercise of religion. 878 This array of challenges were all cogently analyzed in Gunning v. Runyon, 879 a case involving a federal employee working in Florida. 880 In Gunning, the postal employees voted in favor of playing a Christian radio station over the station loudspeakers, but the post office turned off the station radio altogether and instead allowed employees to wear headsets or have small radios at their workstation. 881

Gunning went to federal court, challenging the post office's decision to turn off the religious radio station under Title VII, the First Amendment, and the Religious Freedom Restoration Act. 882 Under Title VII, the court analyzed Gunning's claim under both the disparate treatment framework and the reasonable accommodation framework. 883 To establish a prima facie case of disparate treatment discrimination, plaintiff must show that "(1) he is a member of or practices a particular religion; (2) he is qualified to perform the job at issue; (3) he has suffered some adverse employment action; and (4) someone outside the protected class of which he is a member was treated

872. Hazel, 7 F. Supp. 2d at 1353.
873. Id.
874. Id.
875. Id.
876. Id. at 1355.
879. Id.
880. Id. at 1425–26.
881. Id. at 1426.
882. Id.
883. Gunning, 3 F. Supp. 2d at 1427.
differently." 884 Gunning failed to meet the third element because he introduced no evidence as to any adverse employment action under Title VII. 885 "Inconvenience and loss of enjoyment of life… are not cognizable under Title VII absent some adverse employment action." 886 Even if Gunning could make out a prima facie case, allowing employees to use walkmans, and other private listening devices, constitutes a legitimate, nondiscriminatory rationale that rebuts the presumption of discrimination. 887

As for the reasonable accommodation framework under Title VII, a plaintiff's prima facie case entails: "(1) a bona fide religious belief conflicting with an employment requirement; (2) that he informed his employer of the religious belief; and (3) that he was discharged or otherwise penalized for failure to comply with the conflicting requirement." 888 The court found that Gunning established none of these elements because listening to Christian music was not a tenet of his religion, he did not notify his employer of such belief, and he did not suffer any adverse employment action. 889 Moreover, even assuming Gunning made out a prima facie case, allowing employees to wear headphones "constitute[s] a reasonable religious accommodation under Title VII." 890

The Post Office argued that Gunning’s First Amendment freedom of religion claim was precluded by Title VII. 891 The court agreed, citing Brown v. General Services Administration, 892 where the Supreme Court ruled that Title VII is the exclusive remedy for federal employment discrimination. 893 For this reason, Gunning’s properly cognizable "constitutional claim of religious employment discrimination… [was] cognizable only under Title VII." 894

Turning to Gunning’s free speech claim, the court concluded that it was not precluded by Title VII since it was not an employment discrimination claim. 895 Adopting public forum analysis, the court ruled that the Post Office was a non-public forum, the most restricted, where the employer is free to make distinctions in access on the basis of subject matter and speaker

884. Id. at 1428 (citing Mann v. Frank, 7 F.3d 1365, 1370 (8th Cir. 1993)).
885. Id.
886. Id. at 1429.
887. Id.
888. Gunning, 3 F. Supp. 2d at 1429–30 (citing Beadle v. Hillsborough County Sheriff’s Dep’t, 29 F.3d 589, 592 (11th Cir. 1994)).
889. Id. at 1430.
890. Id.
891. Id.
894. Gunning, 3 F. Supp. 2d at 1431.
895. Id.
identity, so long as they are "reasonable in light of the purpose served by the forum and are viewpoint neutral." Applying this framework, the court found that music interferes with an orderly and productive workplace environment and that the decision to deny access to the public address system for recreational music was reasonable in light of the purpose of the postal service. Moreover, the decision was not viewpoint based, that is, it was not based upon the employer's opposition to the message of the music. In effect, the government has the right simply to close the forum altogether.

The RFRA restored the "compelling interest" test as the appropriate method for analysis of free exercise claims. Although the Supreme Court struck down the RFRA as unconstitutional as applied to the states, and even though its constitutionality as applied to the federal government is far from clear, the court assumed, for purposes of analysis, that the Act was valid. To establish a claim under RFRA, the plaintiff must prove that "he possesses a religious belief and... that governmental action or regulation imposes a burden on the free exercise of his religion." If so, the burden shifts to the government to come up with a compelling state interest for the regulation. Listening to Christian radio is not a tenet of Gunning's Baptist faith, nor would failure to listen to the radio station burden the practice of his faith. Indeed, Gunning is still free to listen to the radio station of his choice via headphones. But, even if Gunning makes out a prima facie case under the Act, the Post Office's interest in avoiding a violation of the Establishment Clause constitutes a compelling state interest sufficient to rebut Gunning's prima facie case.

896. Id. (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (internal quotations omitted)).
897. Id.
898. Id. at 1432.
899. Id.
900. Id. at 1433 (citing 42 U.S.C. § 2000bb(b)(1) (1994)).
902. Id. at 1432–33.
903. Id. at 1433.
904. Id.
905. Id.
906. Id.
907. See Gunning, 3 F. Supp. 2d at 1433.
C. Age and Disability Discrimination

1. Eleventh Amendment Immunity and the Age Discrimination in Employment Act and the Americans with Disabilities Act

In *Kimel v. Florida Board of Regents*, the only issue before the Eleventh Circuit Court of Appeals, and now before the Supreme Court which heard oral argument in October, 1999, is whether Congress properly abrogated the states' sovereign immunity when it passed the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA"). Two district courts have ruled that Congress properly overrode the states' Eleventh Amendment immunity for both Acts, but one district court granted the State's motion to dismiss on Eleventh Amendment grounds.

In *Seminole Tribe v. Florida*, the Supreme Court ruled that Congress's power to abrogate exists only under section five of the Fourteenth Amendment, not pursuant to the Commerce Clause. In light of this case, the *Kimel* court set out two elements that must be met before Eleventh Amendment immunity may be abrogated: 1) Congress must spell out "a clear legislative statement" of its intent by "making its intention unmistakably clear in the language of the statute," and 2) Congress must have invoked its enforcement powers granted in section five of the Fourteenth Amendment.

As for the ADEA, the court sidestepped the second element because the Act does not satisfy the first prong: the lack of unmistakably clear legislative intent. Although a weak case of intent can be stitched together

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913. The enforcement provision in section five of the Fourteenth Amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *U.S. Const. amend. XIV, § 5.*

914. *Seminole Tribe*, 517 U.S. at 57–73 (citing *U.S. Const. art. I, § 8, cl. 3*).


916. *Id.* at 1431.
from disparate language in the Act, the court made clear: "For abrogation to be unmistakably clear, it should not first be necessary to fit together various sections of the statute to create an expression from which one might infer an intent to abrogate."917 The words "the Eleventh Amendment or the States' sovereign immunity" cannot be found anywhere in the ADEA.918 Even in the face of Eleventh Amendment immunity, however, the court pointed out that there are forms of relief, other than direct suits by citizens in federal court.919

By contrast, the ADA contains a clear statement of intent to abrogate Eleventh Amendment immunity: "A State shall not be immune under the eleventh amendment..."920 Moreover, unlike the ADEA, it is also manifest from the face of the statute itself, that Congress relied upon its Fourteenth Amendment enforcement powers when it enacted the ADA: one purpose of the act was "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment."921 In sum, the ADA satisfies both elements for abrogation to prevail, while the ADEA cannot even pass muster under the first element. Chief Judge Hatchett wrote in his separate opinion that he believed that Congress abrogated the states' sovereign immunity in both Acts,922 while Circuit Judge Cox took the exact opposite position, concluding that Congress lacked constitutional power to abrogate the states' immunity under either Act.923

2. The Overlap Between the ADEA and § 1983

In Hornfeld v. City of North Miami Beach,924 Hornfeld was a sixty-year old woman who had worked for the City for ten years.925 In 1996, John Asmar, Hornfeld's supervisor, cut back on Hornfeld's job duties, driven by an imminent downsizing by the City.926 Asmar offered plaintiff an early retirement incentive package.927 Plaintiff claimed that she had no time to weigh her options and accepted the package because she was told that she would be discharged if she turned it down and that a younger, less
experienced employee would take over her job. \textsuperscript{928} Plaintiff brought both a § 1983 claim, alleging a violation of equal protection, and an ADEA claim. \textsuperscript{929} The City contested plaintiff's entitlement to raise the two claims together. \textsuperscript{930}

The federal district court framed the issue as whether the ADEA served as plaintiff's exclusive remedy. \textsuperscript{931} In ruling that plaintiff was entitled to bring both actions, the court relied on Supreme Court precedent "disfavoring repeals by implication." \textsuperscript{932} According to the Supreme Court, "[i]mplicit repeals of statutory rights are recognized only 'when the earlier and later statutes are irreconcilable.'" \textsuperscript{933} For example, the weight of authority holds that claims arising under Title VII may complement § 1983 claims. \textsuperscript{934} The court pointed out that Title VII is the law that "most closely parallels the ADEA." \textsuperscript{935} By contrast, Congress expressly spelled out that the ADEA is the exclusive remedy for federal employees alleging age discrimination. \textsuperscript{936}

Even so, plaintiff bears the burden of establishing that her ADEA claim is "not based on the same substantive rights as her concurrent § 1983 claim." \textsuperscript{937} In other words, to maintain both claims, plaintiff must aim at protecting independently conferred rights. \textsuperscript{938} In this regard, the court pointed to differences between ADEA and equal protection rights: "[u]nlke the ADEA, not all arbitrary treatment is deemed to offend the Fourteenth Amendment. Although the clause protects against age discrimination, the elderly are not a suspect class, and governmental action that disadvantages them is constitutional if it passes the rational basis test." \textsuperscript{939} Moreover, under equal protection, "class membership is irrelevant in assessing an ADEA violation." \textsuperscript{940} Thus, the court concluded that the ADEA and § 1983 "may be used as com-

\textsuperscript{928} Id.
\textsuperscript{929} Hornfeld, 29 F. Supp. 2d at 1360.
\textsuperscript{930} Id. at 1362–63.
\textsuperscript{931} See id.
\textsuperscript{932} Id. at 1363 (citing Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987)).
\textsuperscript{933} Id. (quoting St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 788 (1981)).
\textsuperscript{934} E.g., Johnson v. City of Fort Lauderdale, 148 F.3d 1228, 1231 (11th Cir. 1998).
\textsuperscript{935} Hornfeld, 29 F. Supp. 2d at 1365 (quoting EEOC v. Elrod, 674 F.2d 601, 607 (7th Cir. 1982) (internal quotations ommitted)).
\textsuperscript{936} Id. at 1365 (citing 29 U.S.C. § 633(a)). But Congress implicitly left other remedies open to non-federal employees. Id.
\textsuperscript{937} Id. (citing Johnson, 114 F.3d at 1091).
\textsuperscript{938} See id.
\textsuperscript{939} Hornfeld, 29 F. Supp. 2d at 1367.
\textsuperscript{940} Id. at 1368 (citing O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996)).
plementary forms of relief for employment discrimination in the public sector."

3. Adapting Title VII’s Burden Shifting Framework to ADEA Cases

In Bogle v. Orange County Board of County Commissioners, a former correction officer sued the county, his former employer, for age discrimination in violation of the ADEA and the Florida Human Rights Act of 1992. Given that plaintiff’s case of age bias was wholly circumstantial, the court adopted Title VII’s McDonnell Douglas burden shifting framework to weigh plaintiff’s ADEA claim. The prima facie case of age discrimination consists of showing:

(1) that he was a member of the protected group of persons between the ages of forty and seventy; (2) that he was subject to an adverse employment action; (3) that a substantially younger person filled the position... from which he was discharged; and (4) that he was qualified to do the job for which he was rejected.

If plaintiff met this burden, the county then had to come up with a legitimate, nondiscriminatory reason for its decision to fire the correction officer. In this regard, the county introduced previous disciplinary sanctions and plaintiff’s failure to comply with several policies and procedures. After the county met its burden, the plaintiff had to show that the county’s proffered reasons were pretextual. On this score, the court ruled that plaintiff lost because he failed to come up with any evidence that would have entitled a reasonable jury to disbelieve the county’s grounds for plaintiff’s termination.

In Mize v. School Board, plaintiff worked as a teacher of industrial arts. In 1996, plaintiff was told that he would not be re-appointed for the

942. 162 F.3d 653 (11th Cir. 1998).
943. FLA. STAT. § 760.10 (1999).
944. Bogle, 162 F.3d at 656 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1983)).
945. Id. at 656–67 (quoting Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432 (1998) (alteration in original), reh’g denied, 144 F.3d 57 (11th Cir. 1998), and cert. denied, 119 S. Ct. 405 (1998)).
946. Id. at 657.
947. Id.
948. Id. at 658.
949. Bogle, 162 F.3d at 661.
950. 10 F. Supp. 2d 1314 (M.D. Fla. 1998).
1996-1997 school year in light of low student enrollment in the engineering classes in the drafting department. He was, however, put on a countywide relocation list and indeed was offered a job teaching art to kindergarten classes and elementary students, even though he never taught these levels before. Mize sued his former employer under the ADEA, under Florida's Civil Rights Act of 1992, and under an alleged breach of the collective bargaining agreement. The court only addressed the ADEA claim.

The federal district court spelled out the prima facie case for age discrimination when the plaintiff was not replaced. The plaintiff must show:

(1) that he was in a protected age group and was adversely affected by an employment decision, (2) that he was qualified for his current position or to assume another position at the time of the discharge, and (3) evidence by which a fact finder could reasonably conclude that the employer intended to discriminate on the basis of age in reaching that decision.

Except for this departure from the Mcdonnell Douglas framework, the Title VII burden shifting analysis is the same. Here, since it was not clear which test to apply, the court first applied the Mcdonnell Douglas analysis, concluding that plaintiff met his burden on all four elements. Alternatively, the court applied the Jamison framework and found that plaintiff failed to prove the third element, and thus defendant was entitled to judgment as a matter of law. Under either framework, the employer was able to meet its burden of supplying a legitimate, nondiscriminatory reason for the reassignment, and plaintiff fell short of his burden of proving that

951. Id. at 1316.
952. Id.
953. Id.
954. FLA. STAT. § 760.10(1) (1999).
955. Mize, 10 F. Supp. 2d at 1316.
956. Id. at 1318. Since the other claims were matters of state law, the court dismissed them for lack of federal jurisdiction, after dismissing the ADEA claim. Id.
957. Id. at 1317 (citing Jameson v. Arrow Co., 75 F.3d 1528, 1532 (11th Cir. 1996)).
958. See id.
959. Id. The confusion arose due to a factual dispute over whether plaintiff's position was eliminated. Id.
960. Mize, 10 F. Supp. 2d at 1317. The court assumed that reassignment or demotion counts as a termination under this framework. Id.
961. Id. at 1318.
962. Id. at 1317.
defendant’s stated reasons were a pretext.\textsuperscript{963} Therefore, the School Board was entitled to summary judgment under either framework.\textsuperscript{964}

4. Disability Discrimination

In \textit{Bledsoe v. Palm Beach County Soil \& Water Conservation District},\textsuperscript{965} Bledsoe worked as a resource technician for four years until he was dismissed in 1992.\textsuperscript{966} During his tenure with the Palm Beach County Soil \& Water Conservation District ("District"), Bledsoe injured his knee and filed a claim for workers' compensation benefits.\textsuperscript{967} At the same time, he asked his supervisor to accommodate his inability to walk for long stretches.\textsuperscript{968} As an accommodation, the District offered Bledsoe a job as resource conservationist, but he declined the offer, so the District fired him.\textsuperscript{969} As part of the settlement of his workers' compensation claim, Bledsoe waived his rights to sue his employer for any other claims, except for future medicals, attorneys' fees, and the like.\textsuperscript{970}

Nevertheless, Bledsoe sued the District and Palm Beach County under the ADA, claiming a disability and alleging that his employer's refusal to accommodate his disability (his inability to walk for long distances) was the reason for his termination.\textsuperscript{971} In defense, the District raised Bledsoe's release executed as part of his claim for workers' compensation benefits.\textsuperscript{972} The district court ruled that the County was not Bledsoe's employer but litigation continued against the District alone.\textsuperscript{973} The court ruled that the District fell short of the minimum number of employees required to be covered under Title I of the ADA, so Bledsoe amended his complaint, switching from Title I to Title III liability.\textsuperscript{974} The District argued that Title II does not cover employment and again raised the release signed by Bledsoe.\textsuperscript{975} The district court entered summary judgment for the District.\textsuperscript{976}

\textsuperscript{963} See id.
\textsuperscript{964} Id. at 1318.
\textsuperscript{965} 133 F.3d 816 (11th Cir. 1998), reh'g denied, 140 F.3d 1044 (11th Cir. 1999), and cert. denied, Palm Beach Soil \& Water Conservation Dist. v. Bledsoe, 119 S. Ct. 72 (1998).
\textsuperscript{966} Id. at 818.
\textsuperscript{967} Id.
\textsuperscript{968} Id.
\textsuperscript{969} Id.
\textsuperscript{970} Bledsoe, 133 F.3d at 818–19.
\textsuperscript{971} Id.
\textsuperscript{972} Id.
\textsuperscript{973} Id.
\textsuperscript{974} Id.
\textsuperscript{975} Bledsoe, 133 F.3d at 818–19.
\textsuperscript{976} Id. at 819.
On appeal, two issues were raised: 1) the validity of the release, and 2) whether Title I covers employment. On both counts, the court reversed the ruling of the district court. Relying on Supreme Court precedent governing Title VII, the court made clear that an employee can waive his "cause of action under Title VII as part of a voluntary settlement agreement" if "the employee's consent to the settlement was voluntary and knowing." In this regard, the court set out from earlier Eleventh Circuit precedent, the factors that weigh on whether a release is knowing and voluntary:

[T]he plaintiff's education and business experience; the amount of time the plaintiff considered the agreement before signing it; the clarity of the agreement; the plaintiff's opportunity to consult with an attorney; the employer's encouragement or discouragement of consultation with an attorney; and the consideration given in exchange for the waiver when compared with the benefits to which the employee was already entitled.

Applying these factors, the court ruled that a jury question was raised over whether Bledsoe voluntarily and knowingly released his ADA claim.

As for the second issue, whether Title II of the ADA covers employment, the court relied on earlier Eleventh Circuit decisions implying that Title II does indeed cover employment. Moreover, the statutory language of Title II, the Department of Justice's regulations, and other courts' position on this issue, weighed in favor of concluding that Title II does cover employment. Title II bars public entities from excluding disabled individuals from "services, programs, or activities." The term "public entity" expressly encompasses state and local government.

977. Id.
978. Id.
979. Id. (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974)).
980. Bledsoe, 133 F.3d at 819 (quoting Alexander, 415 U.S. at 52 n.15).
981. Id. (quoting Puentes v. United Parcel Serv., Inc., 86 F.3d 196, 198 (11th Cir. 1996) (quoting Beadle v. City of Tampa, 42 F.3d 633, 635 (11th Cir. 1995)).
982. Id.
983. Id. at 820 (citing Holbrook v. City of Alpharetta, 112 F.3d 1522, 1528–29 (11th Cir. 1997); McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1073 (11th Cir. 1996)).
984. 28 C.F.R. § 35.140(b)(1) (1998). "For purposes of [Title II], the requirements of title I of the Act... apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I [i.e. employs fifteen or more employees]." 28 C.F.R. § 35.140(b)(1) (1998).
985. See Bledsoe, 133 F.3d at 820–25.
987. Bledsoe, 133 F.3d at 821 (citing 42 U.S.C. § 12131(1)).
sum, the weight of authority holds that Title II states a cause of action for employment discrimination. 988

In Seaborn v. Florida Department of Corrections, 989 plaintiffs, all African-Americans employed by the Tallahassee Community Correctional Center, suffered from a skin condition known as pseudofolliculitis barbae ("PFB") that made shaving painful. 990 The Correctional Center made an exception to its "No Beard Policy" for plaintiffs' skin condition. 991 Even so, plaintiffs alleged that they faced discrimination and were passed over for promotions because they wore beards. 992 Plaintiffs sued their employer under the ADA. 993 The district court ruled that plaintiffs' skin disorder did not rise to the level of a disability under the ADA because PFB did not substantially limit their ability to work. 994

On appeal, the State of Florida asserted for the first time that it was entitled to Eleventh Amendment immunity from plaintiffs' ADA claims. 995 Because such a claim is jurisdictional, the court allowed Florida's immunity defense but concluded that it was constrained by Eleventh Circuit precedent that states lack Eleventh Amendment immunity from ADA claims. 996 Turning to the merits, the court sustained the lower court's ruling dismissing plaintiffs' ADA claims on grounds that PFB did not substantially limit their ability to work. 997

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988. Id. at 825.
990. Id. at 1406.
991. Id.
992. Id.
993. Id.
994. Seaborn, 143 F.3d at 1406.
995. Id.
996. Id. at 1407 (citing Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998)).
997. Id.